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CIVIL RIGHTS DIVISION OVERSIGHT

HEARING

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COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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THURSDAY, JUNE 21, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 2:03 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Benjamin L. Cardin, presiding.

Present: Senators Cardin, Kennedy, Whitehouse, and Hatch.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. The Committee will come to order.

First, let me thank Chairman Leahy and Senator Kennedy for asking me to chair this hearing today as the Judiciary Committee carries out its responsibility on oversight of the Civil Rights Division.

It is fitting that we hold this hearing today as we approach the 50th anniversary of the Civil Rights Act of 1957, which created the Civil Rights Division. This was the first civil rights legislation enacted in the United States since Reconstruction.

This hearing is also part of the Committee's ongoing investigation of the firing of U.S. Attorneys for improper reasons and the growing influence of politics in the Department of Justice. I am concerned as to what extent political appointees overrule the recommendations and advice of career prosecutors and staff at the Civil Rights Division when it comes to enforcing the laws and when it comes to the hiring, promotion, and firing of staff.

I am gravely concerned that over the past 6 years the Bush administration has permitted, and even encouraged, political considerations and influence in deciding whether to enforce the law. This Committee will scrutinize the performance of the Division in enforcing anti-discrimination statutes enacted by Congress, including laws relating to voting rights, civil rights, housing, and employment. The Division has the unique resources, obligations, and mandate from Congress to file these types of cases to protect minority rights throughout the United States. In many cases only the Justice Department can file the type of complex and far-reaching cases that can challenge and ultimately remedy and destroy discriminatory practices and patterns, as we continue our long and unfinished journey toward achieving equal rights and equal justice under the law for all Americans.

I am disturbed by today's story in the Washington Post, which gives numerous examples of the improper role that politics is play-

ing in the Division. This Committee will want to hear from the Assistant Attorney General whether he thinks it is appropriate and consistent with the law and Justice Department regulations for a manager to ask his Justice Department staff whom they voted for in an election; whether this is an appropriate factor to consider when hiring, firing, and promoting staff; whether these types of incidents create a culture of intimidation at the Division; whether this culture may have contributed to a large number of resignations and retirements from the Division, followed by the hiring of a less experienced, less diverse, and more ideological group of lawyers; and whether these practices undermine the credibility of the lawyers at the Division and the overall reputation of the Department of Justice.

I also welcome our distinguished panel of witnesses and would solicit their views on the record of the Civil Rights Division. For example, enforcement actions on behalf of racial minorities have declined, such as the filing of disparate impact cases under Title VII. The Division's Appellate Section has dramatically reduced its interventions in major discrimination cases. The Department has hired a large number of new attorneys who have no background in civil rights litigation. The Department has filed a declining number of pattern and practices of employment discrimination cases. The Department has filed a declining number of vote dilution cases under Section 2 of the Voting Rights Act. The Department has filed a declining number of cases challenging abusive policy practices.

This Committee has a responsibility to the American public to ensure that the Civil Rights Division aggressively carries out its very important mandate.

Senator Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I, too, look forward to this hearing. I hope it is a hearing about civil rights enforcement and not just another political meeting, because I think we have tremendous work that we do and have to do. And I want to make sure that we do the type of work that has to be done.

I am particularly happy to welcome Mr. Kim here today. Wan Kim worked for us here on the Committee. He did a tremendous job, I think got along well with everybody on the Committee, and I am very proud that you are down there, especially in this Division, because I know that you take these matters very seriously. And I also welcome all of the other witnesses who are going to be here today.

Thank you, Mr. Chairman.

Senator CARDIN. Our first witness is the Honorable Wan Kim, who has been the Assistant Attorney General for the Civil Rights Division of the United States Department of Justice since November 9, 2005. Perhaps the most important thing about Mr. Kim's background, as Senator Hatch has already pointed out, is that he is very familiar with the work of the Judiciary Committee, having served this Committee with great effectiveness, and we certainly do welcome you here today.

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As is the practice of the Judiciary Committee, I would ask that you rise for the oath.

Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KIM. I do.

Senator CARDIN. Thank you. You may proceed.

STATEMENT OF WAN J. KIM, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. KIM. Thank you. Mr. Chairman, and thank you, Senator Hatch, for attending this hearing. Senator Hatch, I think everyone knows, everyone who has ever worked for you know it is a great privilege and honor to work for you. And certainly my time in the Committee was also a great highlight of my career.

It is a pleasure to appear before you to talk about the work of the Civil Rights Division, and I am pleased to report on some outstanding accomplishments that we have attained in the Division since I last appeared before this Committee 7 months ago. I am very proud of the professional attorneys and staff in the Division whose talents, dedication, and hard work have made these accomplishments possible. My prepared written statement details the accomplishments of each section of the Division, and, Mr. Chairman, I would ask that the entirety of my prepared statement be placed into the record.

Senator CARDIN. Without objection, all of the statements from the witnesses today in their entirety will appear in the record.

Mr. KIM. Thank you, Mr. Chairman.

First, I am pleased to report that exactly 1 week ago, on June 14, 2007, a Federal jury sitting in the Southern District of Mississippi returned guilty verdicts against former KKK member James Seale for his involvement in the abduction and murders of two young African-American men. Now, these crimes were committed 43 years ago, in 1964. Seale and other Klansmen abducted Henry Dee and Charles Moore, both 19 years old at the time, and drove the two young men into a secluded location where the Klansmen beat the victims and interrogated them at gun point. Seale and the other Klansmen then bound the two men with duct tape. The Klansmen then drove the victims to Parker's Landing in Warren County, Mississippi, in a route that took them through the State of Louisiana. Once at Parker's Landing, the Klansmen secured Dee to an engine block and threw him into the old Mississippi River, drowning him. The Klansmen next secured iron weights to Moore and also threw him into the river.

Several months after the kidnapping and murders, divers recovered from the river the badly decomposed remains of the two young men. This case was indicted by the Civil Rights Division and by the U.S. Attorney's Office earlier this year. I would like to express my thanks to the U.S. Attorney's Office for the Southern District of Mississippi for its diligent efforts in working with the Civil Rights Division on this very difficult and very dated case. Our collaborative efforts helped to finally bring justice to the victims and their families.

While the Federal Government's ability to bring civil rights era murders is limited by the provisions of then-existing Federal law, the Department is committed to vigorously prosecuting such cases.

I would also like to commend the Committee for its consideration and support of S. 535, the Emmett Till Unsolved Civil Rights Crime Act, which, if funded, would facilitate the investigation of over 100 civil rights era murders identified by the FBI and the Department of Justice.

Second, we continue to make great strides in our effort to combat human trafficking, increased by sixfold the number of human-trafficking cases filed in Federal court in the past 6 years. On June 14, 2007, again, exactly 1 week ago, a Federal jury in Hartford, Connecticut, found Dennis Parish guilty for his role in the operation of a sex-trafficking ring. The defendant purchased two American citizens, including a 14-year-old girl, for $1,200 each and then forced them to engage in repeated acts of prostitution. This case illustrates all too clearly that human trafficking can occur at any place, at any time, and to any vulnerable victim, and it reinforces the need for the Justice Department to remain vigilant in enforcing the requirements of the Trafficking Victims Protection Act.

Finally, we are vigorously enforcing the requirements of Title VII that prohibit employment discrimination. Our efforts in this regard are highlighted by our recent pattern or practice cases against the city of New York and the city of Chesapeake, Virginia. Last month, in conjunction with the U.S. Attorney's Office, we filed a lawsuit against the largest fire department in the United States—the Fire Department of New York. This suit alleges that the city of New York's use of written exams when selecting entry-level firefighters has an unlawful disparate impact against black and Hispanic applicants in violation of Title VII. We recently settled a similar lawsuit against Chesapeake, Virginia, regarding entry-level police officers. We are committed to bringing these types of difficult cases to guarantee the equal opportunity of all Americans to fill these important positions as firefighters and police officers.

I look forward to working closely and cooperatively with this Committee to ensure the vigorous, evenhanded enforcement of the Federal civil rights laws. Thank you for your attention, and I appreciate the opportunity to respond to any questions that the Committee may have.

Senator CARDIN. Well, Mr. Kim, again, thank you for being here and thank you for your service.

I want to start off by talking about the concern that I have on the experienced career attorneys within the Civil Rights Division and the high turnover, the numbers that have experience, and the manner in which appointments are being made in your Division. Let me start off by stating the obvious, and that is, our civil service rules prohibit that no person employed in the executive branch of the Federal Government who has authority to take or recommend any personnel action with respect to any person who is employed in the competitive service shall make any inquiry concerning the race, political affiliation, or religious belief, et cetera, et cetera; and then the Department of Justice's own regulations that prohibit discrimination based upon political affiliation.

I say that because of the article that appeared today in the Washington Post—and I assume, by the way, that you are acknowledging that you have read that article.

Mr. KIM. I have, Senator.

Senator CARDIN. It makes very serious statements about political considerations being used in appointments within the Department of Justice's Civil Rights Division.

There has also been testimony before our Committee. Bradley Schlozman, who appeared before our Committee, admitted under oath that he had bragged about hiring Republicans. And Monica Goodling, who is not in that Division but within the Attorney General's office, testified under oath in the House Committee that she crossed the line in inquiring into political considerations for career selections, for people who are not political appointments.

So let me start off by just getting your reaction to the testimonies before our Committee from these other witnesses and the article that appeared in the paper. And I must tell you that there have been other accounts from former attorneys about the political influence trying to be exercised on appointments. And then, lastly, if I might—and then I will get your response—there was a change in policy within the Attorney General's office on the committee that interviews and makes the recommendations for appointments from career attorneys to political appointees, which also has a chilling effect, could have a chilling effect on career people who want to come to the Department of Justice in order to carry out their public commitments.

I welcome your response.

Mr. KIM. Mr. Chairman, thank you for that question. There is a series of questions that you asked in there, and I will try to address all of them.

First of all, I want to correct the record. There has been a widespread publication that there have been droves of attorneys leaving the Civil Rights Division in the past 6 years. The statistics do not bear that contention out. The historical rate of attrition in the Civil Rights Division during the previous administration was approximately 12 to 13 percent a year. The historical attrition rate in the past 6 years is about 13.5, 14 percent.

So our attrition figures are in line with and they are not markedly different from the historical attrition rate of attorneys in the Civil Rights Division. We have the great fortune of hiring extremely talented attorneys who have a lot of other options, and as much as I would like them to stay for a very long time, sometimes they do several years of public service and then they move on to other opportunities. And I regret their loss, but I certainly do not blame them for that.

Second, you asked many very good questions about what my views are of career prosecutors and career attorneys in the Department of Justice, and I will tell you that my answer starts from my experience as a career prosecutor at the Department of Justice. I was hired from law school to a clerkship, and from the clerkship to the Honors Program of the Department of Justice in the Criminal Division. So I know very much what it is like to be a career attorney in the Department of Justice. I was subsequently hired to be an Assistant U.S. Attorney in the District of Columbia, and,

again, I know very much what it is like to be a career attorney and to work alongside very dedicated career attorneys.

It is very important to me that when we make personnel decisions, we do so for the right reasons in accordance with all the rules of the road. And I can tell you, Senator Cardin, that I have done that and endeavored to do that every day that I have worked in the Department of Justice.

Senator CARDIN. But you must be concerned about the testimony before this Committee by Mr. Schlozman as to political considerations that were used—at least he implied they were used.

Mr. KIM. Well, Senator, I have reviewed his transcript. I did not see his testimony. And I understand that he denied violating the law that prohibited making personnel decisions based upon political affiliation.

That being said, I will answer your question by saying I am concerned about some of the allegations that have come to light in the media. They are concerning. But I would also note that there is an ongoing and active investigation by both the Office of Professional Responsibility and the Office of the Inspector General, and that investigation I trust will get to the bottom of the matter.

Senator CARDIN. And we appreciate that investigation taking place. We do not know how long that will take, and it is certainly an important investigation. But you have a responsibility as the Division head to make sure that those practices are not taking place today.

Mr. KIM. Mr. Chairman, I assure you, as long as I am in the Department of Justice, I will abide, as closely as possible, to my full ability, by the rules of the road. I have descried for this Committee before what I look for when I make hiring decisions. I am more than happy to state that again on the record. But my hiring philosophy is based upon the talents of the people and the needs of the Division, and that is why I hire people.

Senator CARDIN. Because of all the concerns that have been raised, would you be willing to send out a written affirmation of that within the Department so it is clear that political considerations or affiliations cannot be considered in the appointments?

Mr. KIM. Within my Division, sir?

Senator CARDIN. Yes.

Mr. KIM. I certainly believe that that would be appropriate under the circumstances. But if I may followup, Senator, I do not make hiring decisions without consulting with section management. That is part of, I think, an effective way of hiring people that everyone really likes and is excited about. And so I will tell you that I think my section management understands what I am looking for, and I understand what they are looking for. And I think there is a meeting of the minds there. But I am happy to have those kinds of discussions with section management if there is any need to clarify the record as far as I am concerned.

Senator CARDIN. Well, I think there is a need to clarify the record, and I appreciate what you are saying, and I hope that means that you are looking for the very best people without any litmus test as to their philosophy, but their commitment to enforce the laws and work aggressively to the mission of protecting the civil rights of the people of this country.

Mr. KIM. Senator, I look to hire the best people available to enforce the laws that Congress passed in the way that Congress intended those laws to be enforced.

Senator CARDIN. Thank you.

Senator Hatch.

Senator HATCH. Well, first of all, every administration has tried to hire people that were willing to follow the goals and objectives of the administration. And every administration has different goals and objectives in the Civil Rights Division, all of whom have had good objectives, albeit one or the other of us might think there might be better objectives. I mean, that is just what you get when you get different administrations, and we certainly have put up for years with administrations that did not give any consideration to some of the things that, in particular, I think are important. So this is kind of a red herring.

My experience with Justice is, yes, whatever administration, whether it is Republican or Democrat, they are going to try and find people who will share their beliefs and try and push the programs that they believe are correct. And we can criticize the programs, but I think it is crazy to criticize the fact that a Democrat administration might approach the Civil Rights Division a little bit differently from a Republican one. But I think both of them—my experience in both Republican and Democrat administrations has been that this Division has been run pretty well, and that whatever the particular goals are, they have been acceptable to the Committee.

But I want to thank you for being here today. I apologize that I will not be able to stay very long. This is supposed to be an oversight hearing regarding the work of the Civil Rights Division, and I hope that the politics of the moment will not mean that most of the good work that you are doing and that your Division has done will be ignored.

Now, Mr. Kim, as you know, religious liberty has always been a high priority for me. It may not have been in some Democratic administrations, but it is for me. The right to freely exercise religion is the first individual right mentioned in the Constitution's Bill of Rights. I am glad to see that defending that right against discrimination is also a priority for this Justice Department and the Civil Rights Division.

I sponsored the Religious Freedom Restoration Act, along with Senator Kennedy, and also the Religious Land Use and Institutionalized Persons Act, which President Clinton signed into law. In fact, I was the deciding vote in the Civil Rights Act for Institutionalized Persons back when Birch Bayh was the chief sponsor of that and have had a long record of trying to resolve some of these problems.

Now, my friends on this Committee, Senators Kennedy and Schumer, were cosponsors of that Religious Land Use and Institutionalized Persons Act, which protects the rights of prisoners to practice their religion, among other things.

Now, last week, the New York Times ran an article which quoted one of the witnesses appearing later in this hearing, and it criticized the Civil Rights Division for defending religious liberty and

enforcing statutes like this one that we passed through both Houses of Congress.

Now, I do not agree with belittling our first freedom, which is protected not only by the First Amendment to the Constitution but by the 1964 Civil Rights Act as well. We can have differences on, you know, what the emphasis should be, but, nevertheless, there is no reason to have differences on this.

Now, Mr. Chairman, I have here a letter that was sent today to all members of this Committee by a diverse group of religious organizations. These include the Southern Baptist Convention, the Union of Orthodox Jewish Congregations, the Seventh Day Adventist Church, and both the American Jewish Congress and American Jewish Committee. They write, and I quote in their letter, "to state our appreciation and support for the increased attention that the Division has given over the past several years to the support and defense of religious liberty."

I would ask consent to put this letter in the record.

Senator CARDIN. Without objection, it will be included in the record.

Senator HATCH. Now, Mr. Kim, in February, the Attorney General announced the launch of the First Freedom Project, and I would like you to tell the Committee about it, including the protection of religious rights in the wake of the 9/11 terrorist attacks. Also, please answer your critics who say that you are defending religious rights at the expense of other priorities.

Mr. KIM. Well, Senator, I think that what we are doing is trying to enforce the laws passed by this Congress as effectively as possible, given the priorities that have been defined by this administration. And one of the priorities that has been defined by this administration is the vigorous protection of religious liberties. Those are, as you mentioned, ones that began in the passage of the 1964 Civil Rights Act. And I thought it was particularly important to do so given that when you and Senator Kennedy and other leaders in the Senate passed RLUIPA in 2000, which passed by unanimous votes of both Houses of this Congress, you developed a record which established massive evidence of discrimination in this area.

And given those congressional findings, that law, which was passed unanimously in 2000, the Civil Rights Division believes that it is appropriate to make sure that our resources and efforts are commensurate with the need that Congress found, first in 1964 and again in 2000. We are very proud of the efforts that we have brought to bear on this issue. And I think the Times article, while I think the overarching tone of it was critical, noted within it that almost all of our enforcement actions have been successful, that we are not stretching the bounds of Federal law here. We are enforcing the law neutrally, evenhandedly, and, I submit, on a nondenominational, nonsectarian basis, exactly the way Congress intended us to do so.

Senator HATCH. On the second part of that question, which was to answer your critics that you are defending religious rights at the expense of other priorities.

Mr. KIM. Senator, again, if you look at my prepared testimony, which is somewhat detailed, we have been very aggressive in enforcing all the laws committed to our jurisdiction.

For example, we recently filed a lawsuit involving race discrimination claims in violation of Title VII against the largest fire department in the United States of America.

We have filed six lawsuits alleging a pattern or practice of employment discrimination in the past 2 years.

Now, just to give a frame of reference, that compares with three such lawsuits filed during the last 3 years of the previous administration. So during my time in the Civil Rights Division, which is just about 2 years, I have authorized and filed more 707 lawsuits than during the last 3 years of the previous administration.

So I think that is a record that speaks of my philosophy, that is, to evenhandedly enforce the law wherever I find violations of that law. And it is a priority for us, and it will always remain a priority for us to police those laws that prevent discrimination based on race, national origin, ethnicity, color, sex, and all the other appropriate categories.

Senator HATCH. That has been my experience with you, and that is my direction to you, too.

Keep in mind I may be a little prejudiced in this area because my personal faith is the only church in the history of this country that had an extermination order against my faith, against the people of my faith. And it does not take much of an understanding to look at the current Presidential campaign. Even though the Constitution says that religion should not be a test, there should be no religious test, you cannot read an article about Mitt Romney without finding some fault with his personal faith—and, I might add, ridiculous fault and fault that does not make sense. But, nevertheless, almost every article has something about his faith, even though the man has an impeccably honorable reputation in every way, family and otherwise.

Well, this year is the 150th anniversary of the infamous Supreme Court decision in *Dred Scott*, which I believe is the worst decision ever decided by the Supreme Court—now, that is saying something, really—that slaves were not citizens, among other things. Today we see spreading around the globe and even here in America a modern type of slavery in the form of human trafficking. You have mentioned in your earlier remarks how hard you have worked against human trafficking.

In January, you and the Attorney General announced the creation of a new Human Trafficking Prosecution Unit located in the Criminal Section of the Civil Rights Division. My own home State of Utah has received a grant to establish a Human Trafficking Task Force under the direction of our U.S. Attorney Brett Tolman, who also has diligently served this Committee, as you and a number of your staff have. That will bring together Federal, State, and local law enforcement, prosecutors, and victims services organizations.

Would you please define for the Committee the human trafficking the Department is targeting—you have to a degree—explain why it is being done through the Civil Rights Division, and update the Committee on the results of your efforts?

Mr. KIM. Thank you, Senator. In a nutshell, over the past 6 years, after Congress showed great leadership in passing the Trafficking Victims Protection Act of 2000, the Civil Rights Division

has worked diligently to enforce those protections which ultimately stem from the 13th Amendment of the Constitution, which prohibits slavery and indentured servitude.

During the past 6 years, we have increased the rate of prosecutions by more than 600 percent, and that is a record of progress following, again, the lead of Congress in defining this as a heinous offense worthy of the most vigorous efforts at the Federal level.

Broadly speaking, trafficking can be defined as the subjugation of another human being by force, fraud, or coercion. It typically occurs in two contexts: in sex trafficking and in labor trafficking. Both contexts are deplorable.

In sex trafficking, the victim is typically forced to work in a brothel and service customers every night, sometimes dozens of customers, day after day for weeks and months, and sometimes even longer, Labor trafficking occurs in any context imaginable: working in labor fields, working in homes as domestic servants, working in sweatshops in garment factories. We have brought cases in all of those types of categories.

This is a big problem internationally. It is also a big problem within the United States of America. The State Department estimates that approximately 15,000 people are trafficked within our borders every year. But as the case I talked about in my opening statement reveals, these are not just foreign victims. These are American citizens at times. And they are subjected to some of the worst form of victimization at a continuous level, day after day, week after week, sometimes year after year, imaginable. I think—

Senator HATCH. It is a modern form of slavery, isn't it?

Mr. KIM. It is a modern form of slavery, Senator. Many Congressmen have said so. I believe you have said so. This is a despicable form of conduct, and we are very, very pleased to implement the will of Congress and to get some of the very, very serious penalties that Congress properly attached to these crimes.

Senator HATCH. Well, thank you. Also, please respond to your critics who say that human-trafficking and slavery cases are taking precedence over what the critics say are the Division's most traditional criminal cases. Now, some of the critics have said that you are pursuing human-trafficking and slavery cases at the expense of hate crimes and police abuse cases. So could you respond to those charges?

Mr. KIM. Senator, I am very proud of my years as a prosecutor, and one of the things you learn as a prosecutor is you take the cases that you find and you take the violations where they occur. And I think Congress passed the TVPA for a good reason: they saw a big problem in America that we needed to tackle. And so I think, rightly, our prosecutions in that area have increased by 600 percent over the past 6 years.

But we have not neglected our traditional responsibilities. In fact, if you look at the core of what the Criminal Section of the Civil Rights Division has done since its inception, it is prosecuting what is called 242 violations—violations committed under color of law, typically excessive force by law enforcement officials.

With respect to that category of criminal conduct, convictions over the past 6 years have gone up by 50 percent. So with respect to all of the statutes committed to our jurisdiction, we have been

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vigilant in enforcing the cases where we find them. And I have made a pledge many times before, and certainly before this Committee, that I will bring cases where I find the facts and the law to be appropriate. I will not shirk away from cases because I do not like the result. I believe that is for Congress to define. Congress defines the law. It is my duty to carry out that law.

Senator HATCH. Do you feel that you have been political in any way in this position or that the people who serve with you are political in any way?

Mr. KIM. Senator, I have done my level best to make sure that my conduct comports with the oath of office that I have taken, and that is to enforce the laws. And I believe that in many respects the service that I have had in the Civil Rights Division as a political appointee, the service I have had in the last 2 years as a Senate-confirmed Assistant Attorney General is a logical outgrowth of my 7 years of service as a career prosecutor in the Department of Justice. At all times I have felt that it is my duty to enforce the law. I have never seen that differently.

Senator HATCH. Well, I have been watching you down there, and I think you have done a really good job. Now, that does not mean that we cannot do better, and I would just encourage you to do the best job you can because it is inexcusable for any violations of civil rights of whatever kind in this country to not be prosecuted or at least not be worked against.

Mr. KIM. Senator, I appreciate your support. Thank you.

Senator HATCH. Well, thank you.

Mr. Chairman, I took a little longer than I should have, perhaps.

Senator CARDIN. Senator, it is fine.

Mr. Kim, we take pride in Congress on strengthening our trafficking laws. It was done in bipartisan legislation strengthening the tools given to the Department of Justice and the State Department in order for the United States to be a leader on trafficking issues. So we are pleased that you are moving forward in those areas.

My concern is that when I look at the areas that have been where the Department of Justice, the Civil Rights Division, has had tremendous impact in advancing civil liberties, you look at job discrimination cases because economic empowerment is critically important to our communities; you look at major discrimination cases where you can have impact well beyond the specific case that is brought, or abusive police practices, which is a signal to a community as to how the Federal Government will be there to stand up to governmental abuses at the local level; you look at all these areas, and the statistics seems to indicate that they are not priorities within your agency.

Now, you look at the—take job discrimination cases for one moment. The number of cases that you have filed is about half of what was done in the previous administration. You have more attorneys and are filing less cases. That does not seem to instill a spirit that the Department of Justice believes that discrimination in employment is a priority.

Mr. KIM. Senator, might I respond?

Senator CARDIN. Certainly.

Mr. KIM. Senator, I have been the Assistant Attorney General since November of 2005. In that less-than-2-year period, I have authorized the filing of six pattern or practice of employee discrimination lawsuits. Again, if you look at the previous record of the previous administration, during their last 3 years, which is the trend line, I think, they filed 3 707 pattern or practice of employment discrimination lawsuits.

So I have during my short tenure approved the filing of twice as many, and I think that that shows my commitment to bring cases where I find violations.

Now, you do not always find violations everywhere you look, but we do make an effort to look broadly. That is my commitment. And my secondary commitment is that where we find violations, where we think the legal standard is satisfied by the facts that we develop in our case, you have my absolute commitment that I will authorize that case. And I have tried to bring that to bear by some of these cases.

Senator CARDIN. I take it that you were not satisfied with the progress made with job discrimination cases before you came on board?

Mr. KIM. Senator, I do not fault any of my predecessors. I think they did their jobs admirably, as well as they could. It was a priority for me because I wanted to make sure that I was implemented the Attorney General's directive and my oath.

Senator CARDIN. The record shows the Division has filed almost as many cases alleging discrimination against whites as they have against African-Americans or Latinos. Now, discrimination in any form is wrong, and we want the Department of Justice to speak out on behalf of every American in the form of discrimination. However, I think it is apparent that efforts to help racial minorities is where the Department of Justice must place its priorities.

That concerns me. It appears—I mean, you are giving the impression—first of all, do you dispute those numbers?

Mr. KIM. Senator, I do not know exactly where those numbers come from. I think that they may be a compilation of statistics over some period of time.

I can tell you, I can rattle down the cases that I have authorized, and they are three on behalf of African-Americans and Hispanic Americans, one on behalf of women, one on behalf of whites, and one on behalf—with discrimination against Sikhs and Jewish Americans. That is not one that places special importance on the role of discrimination against whites. I mean, I think discrimination, as you do, Senator, against any group based upon their race is offensive and in violation of Title VII, and it is my duty to enforce those cases. But I do not think that I have placed disparate attention on cases involving any one racial minority. I do not think that is my job.

Senator CARDIN. I appreciate that. I have been told by staff that those numbers came from your website, so that is where our source is. I am sure it is a good source.

Mr. KIM. Senator, I think that is a good source. I will have to go back and check them all again. I can actually rattle off the case names of the seven cases I just cited to you.

Senator CARDIN. Well, let me move to some specific cases, because then perhaps we can—and these might have been initiated before you took on your current responsibilities, so maybe your views are different. But I certainly am concerned about trying to match up your statements in your statement for the record and your testimony here about aggressively fighting any forms of discrimination and the traditional role the Department of Justice and the Civil Rights Division to really be the leading enforcement agency to protect the rights of minorities in this country.

The Solicitor General—this is the *Burlington Northern* case, where the Solicitor General joined with the employer in that case arguing that the anti-retaliation provisions confine actionable retaliation only to employer action and harm that concerns employment and the workplace, a rather narrow interpretation. The Solicitor General joined in that issue. It was ultimately rejected by the Supreme Court by, I think, an 8–1 decision.

Again, it seems that the administration went out of its way to try to narrow the enforcement of our discrimination laws.

Mr. KIM. Senator, with respect, I do not see it that way. The issue in that case was one where we joined on the side of the worker, but we argued for a different legal standard to apply. And the Supreme Court, admittedly, ruled on the side of the worker and adopted a different legal argument than the one we urge.

But what we did in that case, the United States entirely—I mean, the Solicitor General obviously makes the determination on these cases, although my name appeared on that brief. We are trying to interpret to the best of our ability what Congress intended in these laws. And we know that statutory interpretation questions sometimes pose difficult analytical conundrums. I mean, sometimes we get it right. I think we get it right a lot more often than we get it wrong. And in that case, the Supreme Court went a different way with what it thought the statute meant.

But I think you are citing one case as opposed to the litany of cases that we filed, especially on the issue of ADA compliance, on the issue of race-based classifications, and in those cases we have taken positions that we think, again, do not favor one group or the other, because that is not our goal. Our goal is to try to figure out what did Congress mean and how can we best enforce Congress' will. And if you look at *Johnson* v. *California*, if you look at *United States* v. *Georgia*, if you look at the Title III ADA cases, including *Specter* v. *Norwegian Cruise Lines*, those were cases where we advocated a position that some might consider to be plaintiff-friendly. And, again, that may be the outcome.

But my approach in figuring out what to do in those kinds of cases is figure out what is the right answer. I have a great deal of respect for this institution having served this institution for one of its, I would submit with bias, leading Senators. I know that the job of the executive branch, especially the job of the Department of Justice, is to effect the will of Congress and implement it in legislation and not substitute my judgment or anyone else's judgment for that.

Senator CARDIN. Mr. Kim, you have a strange way of starting that out by saying you are on the side of the employee on that

case? I mean, wasn't that a narrow interpretation which the Supreme Court gave a much broader interpretation?

Mr. KIM. The interpretation of law and how it applied is absolutely a little bit different. But in terms of what the judgment was—

Senator CARDIN. More favorable to the employee.

Mr. KIM. More favorable, yes. But the rule that we urged would have also benefited the employee in that case. So the question is which way do you line up on the side of—and then what analysis do you urge.

Senator CARDIN. That is an interesting point. Again, I would say that when the Department of Justice enters a case, it is a signal beyond just that individual case. And I think the *Burlington Northern* case was a signal that the Department of Justice was looking for accommodations to employers more so than trying to help employees who had retaliatory actions.

Mr. KIM. Senator, with respect, that was not my intent in that case. When I approach these cases of statutory interpretation, I apply all the legal tools that I have at my disposal, which I admit are limited, to try to get to the best answer based upon what I think Congress meant when it passed that statute.

Senator CARDIN. I have some additional questions, but my time on this round has expired, so let me turn to Senator Hatch in case he has some additional questions.

Senator HATCH. Let me just ask a couple questions.

I think we are well served down there at Justice with you, and I think your time up here has stood you in good stead because I think you realize that there are two sides on all these issues, and it is important that we understand that both sides need to be looked at. But I would like to look at the Civil Rights Division's efforts to protect the rights of the disabled.

In 1979, nearly 30 years ago, I cosponsored the Civil Rights of Institutionalized Persons Act, which I mentioned earlier. I was the deciding vote on that. I took a lot of flack for it. It did not make any difference to me because I thought I was right and that was the way it should be.

That bill did not pass until after we invoked cloture on the fourth attempt, which was pretty much not normal in the Senate. Hardly any votes went beyond one, two, or three. But it passed, and today the Civil Rights Division is charged with enforcing it, protecting the rights of persons in institutions, such as nursing homes, juvenile justice facilities, and mental health centers.

Now, could you tell the Committee a little bit about your efforts there and whether or not you are having success?

Mr. KIM. Yes, Senator. We take very seriously the requirements of both the Americans with Disabilities Act and the Civil Rights of Institutionalized Persons Act—

Senator HATCH. Well, I was a prime cosponsor on the Americans with Disabilities Act, too, and the act of 1990. And so I would like you to tell the Committee about programs such as the New Freedom Initiative, Project Civic Access, and the ADA Mediation Program, as well as the results that the Department is achieving for the disabled in different kinds of settings, such as hospitals or public transportation.

Mr. KIM. Well, I appreciate that question, Senator, and certainly you have shown great leadership in this arena. The whole point of the ADA and then the President's New Freedom Initiative is to try to make all Americans participate fully in all areas of American life, and that is ultimately an issue of empowerment and it is ultimately an issue of treating people with dignity and recognizing that, as the President has said, no unworthy person was ever born.

We have tried to implement those laws and that policy directive by vigorously going out and working with communities across the country in the context of the ADA to make sure that community services are accessible to all individuals, including those individuals with disabilities.

In that very, very Herculean effort during the past 6 years, we have reached agreements with more than 150 communities since this program began, and 80 percent of those agreements were reached during the past 6 years. And in the past 6 years, we have made through these agreements lives directly better for more than 3 million people, Americans with disabilities across the country.

That is not a record that is achieved overnight. It is not a record that is achieved without a lot of hard work and commitment and attention. And it is not a record that we could have attained without having Congress pass a law that allowed us to go out there and implement that type of direction to the localities across the country where people with disabilities reside.

In the context of institutional facilities, ensuring constitutional conditions, we have obviously implemented Congress' will in that direction by noting that when someone is committed to the custody of the State, the State now has an obligation to that person to treat them in a certain way, to make sure that they are being treated within constitutional conditions. We have implemented that in jurisdictions across the country, from jurisdictions including St. Elizabeth's Hospital in D.C. to agreements in Maryland, to agreements in Texas, to agreements basically all across the country.

One area of particular focus for us in the past 6 years has been in juvenile justice facilities. When choosing among the myriad of facilities and institutions that are run by State and local actors that are governed by CRIPA, we thought to focus our resources primarily upon the most vulnerable members—the youngest in our midst, the Nation's youth, the Nation's future, those who are confined to institutions, making sure that when they are confined to those institutions, that is not a backward step in their lives, that that is at least a neutral step, if not a forward step, and in doing that making sure that they are treated with the kind of dignity, care, and respect that they are entitled to under the Constitution.

Senator HATCH. Well, I have a lot of other questions, but let me just end with one last question, because all Americans are mindful of our soldiers and our veterans, especially at a time of war. The Civil Rights Division, as I understand it, is actively defending the rights of veterans and service members to vote and when they return to civilian employment. If you could, tell the Committee about your efforts to enforce such laws as the Uniformed Service Employment and Reemployment Rights Act and the Uniformed and Overseas Citizen Absentee Voting Act. If you could, I would like to know where you are on those.

Mr. KIM. Thank you, Senator. We have been fortunate to be entrusted with the responsibility to help protect some of the civil rights of our service members. Having formerly served in the United States Army Reserve, I have a firsthand appreciation for the rigors of service and a great and profound admiration for those of us Americans who serve, especially at a time of war.

These are laws passed by the Congress to make sure that when a soldier is called to duty and, not in America, to vote on election day, that their vote is still counted, that they still have a way to help pick the people who govern us. And so in the past few years, we have been vigilant in enforcing the provisions of UOCAVA, working cooperatively with States at times and filing litigation at times, to make sure that they have a system in place for their elections that allowed that overseas service member to vote in the elections and to help pick who gets elected to represent them.

With respect to USERA, the Uniformed Service Employment and Reemployment Rights Act, that was a statute for which jurisdiction was recently transferred to the Civil Rights Division, and that is one that we have embraced. It affects the employment rights of people who serve, making sure that they are not discriminated against for serving their country, and making sure that when they come back after serving in a field of battle or serving abroad or serving somewhere else, that they have their job guaranteed back to them. We have been aggressive in investigating those claims along with our partners at the Department of Labor, and we have been aggressive in litigating those matters where we cannot successfully resolve those claims. That is work that is important to us, and it is work that we intend to continue.

Senator HATCH. Well, thank you, Mr. Kim.

Thank you, Mr. Chairman. I will submit the rest of my questions. I just want to tell you that I appreciate the service you are giving and those who work with you. There is always more to do, and we just encourage you to do the very best you can across the board in this very, very important Division down there at Justice.

Mr. KIM. Thank you very much, Senator.

Senator HATCH. Thank you.

Senator CARDIN. Mr. Kim, I am glad Senator Hatch raised the issue of voting because I want to go into a little bit of voting. But let me just complete the question in regards to the *Burlington Northern*, because we are trying to look forward as to what type of activities we can expect from the Civil Rights Division.

In retrospect, do you believe, now looking at the Supreme Court decisions, that your Department will be more cautious about those types of positions that you take in employment cases?

Mr. KIM. Senator, with respect, we do not wade into these waters without being cautious. I mean, we took a very hard look at that case. The Solicitor General is a very smart man. I think I am fairly adept on certain legal issues—not as smart as he is—and we put together our best reading of the statute, and that is what we write on paper. And it is completely transparent what our argument is and why it is that way.

If your question is do we respect the opinion of the Supreme Court, absolutely. We respect the opinion of the Supreme Court, and that is the way we will interpret the statute.

Senator CARDIN. Of course, we want you to be aggressive also. Could you explain why you did not enter the *Ledbetter* case? The *Ledbetter* case was where the civil rights community was forced to advocate on behalf of the EEOC position regarding the statute of limitations in Title VII, a disparate pay case, because the Department of Justice refused to support the EEOC's position. This was DOJ basically supporting the 180-day statute of limitations, why you did not support the agency's recommendations.

Mr. KIM. Senator, the internal advice that I gave is not something that I can discuss in a public forum, but I am not sure that your characterization I can comment upon one way or the other.

I will say this: The position advanced by the United States in that case was the one adopted by the Supreme Court.

Senator CARDIN. Yes. Well, perhaps you will get back to us on that. I am still—it seems like the Department of Justice, which should be available to pursue cases that are of significance, and the statute of limitations clearly is—this is one of significance, should be working with our civil rights community and particularly if we have an opportunity to make some advancement here. It appears that the Department of Justice was closing doors rather than opening doors.

Mr. KIM. Senator, again, if I could, my goal and I believe our goal when we try to interpret a law and offer an amicus brief or a brief in support of a certain proposition, according to statutory construction principles that I follow, starts from the law itself, not to what result might interest this group or that group. And then we make our best determination using legal analysis and reasoning and precedent as to what the proper interpretation is. And in that case, the Solicitor General advanced the interpretation that ultimately the Supreme Court agreed to.

Senator CARDIN. We want you to make your best judgments. We want you to follow the law. We want you to follow the congressional authority that you have and the tools that you have. But we also want you to work with the advocacy community so that we can advance civil rights in this country.

Employment discrimination cases are difficult cases, and it seems to me that in this case—this was a case that was heavily watched, and, again, it looks like the Department of Justice was more interested in taking an easy pass and not working for an advancement in this area than trying to figure out ways that they could advance protection that is offered in employment cases.

Senator HATCH. Mr. Chairman, if I could just—

Senator CARDIN. Certainly, Senator.

Senator HATCH. It seems to me their job is to enforce the statutes that we enact up here. They cannot just sociologically decide to ignore the statutes just because some of us up here may not like the result. And it is apparent that the Supreme Court took the same position, and one of the times when they literally observed what we did up here.

Now, if we do not like the statute, we ought to change it, and that would be my answer here, because, you know, I would not want you to substitute your own personal predilections for what we pass up here. If you did that, I would be pretty darn mad.

Mr. KIM. I do not think I could, Senator.

Senator HATCH. Even though that may be an unjust result.

Senator CARDIN. Let me take back my time just to say that Mr. Kim already pointed out that his attorneys are pretty effective. Perhaps if they were on the side of the EEOC, maybe the Supreme Court would have ruled a different way. I do not know. But it would be nice to know that we are all on the same wavelength. If you believe the laws need to be changed, you should be coming here suggesting changes in the law. If you think the laws are adequate, fine. But in a way, you did not take a position on that, and it was an important issue for the civil rights community. I would just like to know your position on it. And if you think it is fair and the civil rights community is wrong, then speak out about it. But to not take a position, as you did in not joining the agency, to me was not as open as you should have been.

I want to get some voting rights cases, and I know Senator Whitehouse is here, so let me just take a minute or two more, and then I will come back on the next round.

You know my concern about what happened in Maryland. You and I had a conversation about it as to, in my view, deliberate actions taken to try to marginalize minority voters. It was not isolated. There also were cases in Virginia where callers tried to intimidate or confuse Democratic voters in a pretty contested Senate race. And the Arizona Republic reported that in Tucson three vigilantes—one carrying a camcorder, one holding a clipboard, and one a holstered gun—stopped Hispanic voters and questioned them outside a Tucson polling place.

I could go on and give you more and more examples, and I know you and I have talked about whether the Federal laws are strong enough or not, and we have a bill pending that I hope will be passed that will clarify this. But voting representation, being able to vote, is such a fundamental issue, with the 50th anniversary of the creation of your Department, the passage of the Voting Rights Act, and still today there are candidates and parties that think it is fair game to try to marginalize minority voters.

If you think it is not a problem, say it is not a problem. If you think it is a problem, then do something about it. If you think it is a problem and you do not have the tools to deal with it, tell us what tools you need. But I think just to sit back and be a passive observer is not an option that the Civil Rights Division should be taking.

We had a hearing here, and I have not seen the administration come in with a statement in support of our legislation. I have not seen any position on this. And I just think this is a pretty fundamental issue.

We have had conversations about it, and I guess I expected to hear something about whether you believe the circumstances are just fine, whether you have the tools to do something about it, or whether you think you need additional tools from Congress in order to pursue these issues.

Mr. KIM. Senator, we have spoken on the issue. I have appreciated those conversations, and I think we have had what I hope was a productive dialog as to what the laws are that the Department of Justice, and particularly the Civil Rights Division, as far as I am concerned, enforces.

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I know you have been a leader in trying to supplement the Federal laws that are currently on the books to address some of the instances that you just recounted. All I can tell you at this point, Senator, because I am a voice of the administration, is that I am aware that views are being put together. I am not in a position to articulate those views because they have not been cleared, but I do believe the administration is prepared to make a statement with respect to the legislation that you have supported and that is pending within this body.

Senator CARDIN. Well, I appreciate that it has to be cleared before you can tell us specifically, but can you at least share with us whether you believe that there are concerns out there about what is happening with voters?

Mr. KIM. Senator, I as a personal matter do not like dirty tricks. I think that everyone who is registered to vote and is qualified to vote should vote on election day, and I think that we should make that process as painless as possible.

And so, in general, my predilection and I think the Department's predilection is to try to make it easier for people to vote and to vote, you know, their mind and to vote exactly the way they intend the election to be voted.

That is my general statement, and I hope that satisfies you because the more specific views letter I hope will be coming.

Senator CARDIN. Well, let me try one more question. When can we expect the administration's view on this?

Mr. KIM. Senator, I am looking behind me to people who are actually more knowledgeable. I know—

Senator CARDIN. They did not say anything. They left you on your own.

[Laughter.]

Mr. KIM. That happens sometimes. I do not know exactly why.

The short answer, Senator, is I believe it is in the process. It is hard for me to predict these things because sometimes I think it is going to happen in a couple days and it does not, and then people get mad at me. The truth of the matter is I know that it is past the point of discussion and actually to the point of writing and to the point of circulation, and that is as—

Senator CARDIN. Well, I hope we receive it shortly, unless I do not like what I receive, then take your time.

Mr. KIM. Well, Senator, I think you know my phone number, so I may be back in your office.

Senator CARDIN. Senator Hatch.

Senator HATCH. Let me just make this one comment. You know, we up here have got to be very careful, too. We should not be trying to make the case of politics—we cannot say—or should I say that politics should not be involved in hiring Justice Department employees, and then assert that politics should be involved in what those lawyers do by picking sides. It seems to me that you have a tough enough job without us second-guessing everything you do. And I know that you are trying to do the best job you can. And to me that is very, very important.

Just one last question and then I probably have to go. When we think of law enforcement and the prosecution of crime, we most often think of current events, but crimes remain unsolved for even

decades ago during the fight for civil rights. I am a cosponsor of the Emmett Till legislation, and I am very proud to cosponsor that.

In February, you and the Attorney General announced a new initiative to investigate these crimes. Now, tell the Committee about how this initiative will work and how you will partner with nongovernmental organizations. And I understand that just last week a Federal jury in a case brought by the Division—well, you mentioned it—convicted James Ford Seale of crimes committed against two African-American men in 1964. You have told us about that case and how important that case is, and I commend the Department and all who worked on that case for being able to bring about the result that we all knew should have been brought about a long time ago.

Now, some of your critics, however, including on the panel that will follow you in this hearing today, say that the Civil Rights Division is actually undermining enforcement of the Nation's civil rights laws. Now, that is a dramatic claim that the Division is quite literally doing the opposite of what it is supposed to do.

Now, these critics say the changes in priorities, policy, or personnel have stopped the Civil Rights Division from engaging in aggressive civil rights enforcement. Now, these critics seem to say that unless you follow their priorities and bring their preferred cases or apply their policies, you simply do not believe in civil rights and you are simply not enforcing the civil rights laws of this country.

Now, I am sure you have heard these criticisms before. I think they are very unfair. But I do want to give you an opportunity to respond to them.

Mr. KIM. Senator, I did not come to the Civil Rights Division without any background or any experience or any work at the Department of Justice. Quite to the contrary, I have been a prosecutor for basically my entire career. I clerked for a year, I spent 2 years in private practice, and the rest of my time I have been a Federal prosecutor or in the Department of Justice.

I have viewed my job at the Department of Justice, be it in a career rank or a political rank, the same way, and that is to go out there and try to find as many violations that you can prove of Federal law that are committed in your jurisdiction as possible. That is why I think we have been doing a good job, in my view, on bringing pattern or practice of employment discrimination lawsuits. That is why last year in the Voting Section we filed 18 lawsuits, which is more than twice the average number filed in the previous 20 years on an annual basis. That is why I think we have been aggressive in going after a murder that was committed 43 years ago. When we find facts to support Federal violations, we bring those kinds of cases.

My commitment and the oath I take and the obligation I think that those of us at DOJ have is to go out there and enforce the laws as vigorously as possible and make sure when you are doing that, you are following the will of Congress as enunciated in those laws—not what you think, not what other people may tell you to think, but what the statute says.

I do not believe I have many other alternatives than that, and that, quite frankly, is not my view on what else I should be doing.

That to me is my charter and my goal. I have tried to the best of my ability to execute that during the 11 years I have been at the Department of Justice. And so long as I serve at the Department of Justice, you have my commitment that I will do my level best to enforce the laws that you give us to enforce.

Senator HATCH. Well, thank you.

Thank you, Mr. Chairman. You have been very kind.

Senator CARDIN. Thank you.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Good afternoon.

Mr. KIM. Good afternoon, Senator.

Senator WHITEHOUSE. I am sorry if I am going over previously plowed ground.

Mr. KIM. Not at all.

Senator WHITEHOUSE. I came in after some of the statements, but there have been astonishingly frequent reports coming out in the media and in various other fora recently that the internal administration of your Division has been driven by politics, that hiring has been driven by politics, that performance evaluations have been driven by politics, that assignments within the Division have been driven by politics. And by "politics," I do not mean office politics. I mean partisan Republican-versus-Democrat politics.

There have been instances of people voting with their feet to get out of the Department after long and presumably very honorable careers. There have been members of the Division speaking out, either anonymously or by name, to express their concern and in some cases I would say even horror and dismay at what has become of the Division. Mr. Schlozman admitted here that he bragged about allowing Republican—that he, in effect, got more Republicans in. Monica Goodling admitted that in her hiring practices she crossed the line. The Honors Program was turned over to partisan political officials for hiring for the first time in its history. I guess that has been corrected, thank God.

There is a new preeminence, or prominence, I should say, of Regent Law School. Over and over again you see symbols that would suggest that internally the management is in a state of—let's put it this way, was in a state of considerable partisanship and is presumably now in a state of considerable disarray as it tries to recover.

My question to you is: What are you doing right now to remedy this very difficult situation with respect to evaluating whether these charges are true internally with respect to repairing the damage and the morale within your section, with respect to clarifying what policies are and making sure that they are being followed and that it is being done neutrally, and with respect to reassuring people that they will be judged on the merits, not by whether they are Republicans or voted for George Bush or are members of the Federalist Society or went to the right law school?

Mr. KIM. Senator, I appreciate that question because I have heard of these allegations, and they have been charged, and I am concerned about the public perception that I do not believe exists in the Civil Rights Division so long as I have been the Assistant Attorney General.

We just had a retreat, the first retreat for the Civil Rights Division management, leadership management, that we have had in 7 years, and we spent 2 days, and we talked about a lot of management issues, and we got a chance to actually sit in a room, heard a great address by Chief Judge—I am not sure he is Chief Judge anymore, but J. Harvie Wilkinson on the Fourth Circuit, who talked about his time in the Division in the 1980's. And that is a long, roundabout way of telling you that I care very much about the Division, I care very much about the morale of the people in the Division, I care very much that people in the Division believe that they will be evaluated fairly, for the right reasons, and sometimes that means—most times that means they will be evaluated for doing a great job, and sometimes that means that they could do a better job and they need to improve.

That type of transparency based on merit and qualifications is important for me to know that people believe that. And—

Senator WHITEHOUSE. You can continue with your answer, but let me interrupt you just to ask: Do you accept that, because you are the Civil Rights Division of the United States Department of Justice, in terms of the way in which you administer your internal personnel matters, you should set a very high standard and a very high example for getting it right and now allowing inappropriate considerations? If you can do it, that kind of sends a signal to the rest of the country of kick down the doors, let's do this anywhere?

Mr. KIM. Senator, I mean, I will take it even more broadly that that. I know you served with distinction as a U.S. Attorney. I believe that same standard should apply throughout the Department of Justice. I think that we should be the standard bearers in how lawful, fair, governance should apply within the ranks of any Division. And I think that I have been pretty transparent to my section chiefs and to the Division's leadership and certainly to my staff as to what I expect. And I think I have set a tone that I hope is respected in that sense that people need to be judged for what they do and how they do it. And talent and competence and ability and desire to me matter. Other things do not matter.

Obviously, I want attorneys who are smart, but you find smart attorneys in a lot of law schools. I went to a pretty good law school. I do not think my law school is the only law school that produces good attorneys. And I have found terrific lawyers in law schools across the country, and I do not think we should have an unduly narrow focus. But I will also tell you, Senator, that we hire a lot of people from Harvard and Yale. That just happens to be two awfully good law schools where we get a lot of applicants. We probably do not hire enough people, in my view, from the University of Chicago, but maybe we could rectify that in the next few years.

But in my judgment, the best assurance that I can give you that I follow the rules of the road and I turn square corners in my personnel management practices is not only the fact that I was a prosecutor, a Federal prosecutor in the career ranks for 7 years, but because I will also tell you that the first thing I ask with respect to any personnel decision is: What does the section chief think? And my deputies know not to even bring an issue to me—unless they want me to decide the issue—unless they have the concurrence of that career section chief, who has an average of 17 years of experi-

ence within the Civil Rights Division, if you look across the ranks of my Division.

That I think provides you with some assurance that I am making decisions and trying to make decisions for all the right reasons, and I hope that message filters down. And I think that—

Senator WHITEHOUSE. And specifically in response to these recent allegations, other than the retreat, have you taken any other steps?

Mr. KIM. Well, Senator, two things that I did immediately upon my confirmation as Assistant Attorney General: one, I established an Office of Internal Ombudsman, who is staffed with a career, to field complaints from the field. Now, I encourage people to use the chain of command. We have a lot of attorneys in the Division, and they cannot constantly be bucking their chain of command to talk directly with me. So I encourage people to use the chain of command. And, also, instead of subverting that chain of command, I have asked them to talk to the Ombudsman first before they contact me, because some career leadership felt rightly that if people still felt they needed to come to me all the time, then their role would be marginalized. And that Ombudsman I think has been helpful in resolving a lot of issues.

I try very hard to make sure that I get out to the sections every once in a while. Now, that varies greatly depending on the time of the year, but I do try to make myself available on a personal level. And one of the most significant things that I think I have done since I have become head of the Civil Rights Division is to establish the Professional Development Office, which was instrumental in creating the leadership retreat, but also instrumental in creating for the first time ever a formal training program for attorneys who are hired to work in the Civil Rights Division. We are a Division with now 350 attorneys, 700 employees. We have never heretofore had a way of welcoming them into the Division, telling them what the rules of the road were, showing them the statutes. Now we do. And we have had week-long training sessions now three, four, five times. I believe it has been a great success.

Senator WHITEHOUSE. Given all those wonderful things that you have said, with respect to the allegations that have been made so frequently from so many different sources very consistently about what has happened in terms of the internal personnel administration of the Civil Rights Division, would you wish me to conclude that that happened before you got there, or that the people who are making these allegations are mistaken? There seems to be a bit of a disconnect between the very, you know, principled discussion that you are giving me now about how that Division is managed from what an awful lot of people are willing to say, both on and off the record, about the problem.

Are you telling me that there really is not a problem? Are you telling me you have got your hands around it and you have corrected it? Where do we stand on this? Was there never a problem?

Mr. KIM. Senator, there is an Office of Inspector General investigation as to whether there was a problem, and I expect to cooperate—

Senator WHITEHOUSE. Well, you are in charge of the Division. You ought to know if there was a problem.

Mr. KIM. Senator, what I can give you an assurance is to all the things I testified, that is the model that I have set and the standards that I have demanded ever since I have been in the Division as Assistant Attorney General. I have endeavored to do the right thing all the time, and that if people are concerned about what I have done, I hope they contact me and talk to me about it.

I think that I have set a tone. I hope that that has filtered down. I think that I have made principled decisions in cases, in hiring decisions, in the course of the work that I do. And at the end of the day, other people will have to judge whether that is true or not or whether I did a good job or a bad job. But I have done my level best to do the best job I can.

Senator WHITEHOUSE. Well, simply put, was there or is there a problem?

Mr. KIM. Senator, I don't believe there is a problem, and I don't think there is a problem ever since I have been the head of the Division and been assigned with the responsibility of stewarding the Division and its personnel practices.

If there was a problem—

Senator WHITEHOUSE. Do you have an explanation for this cascade of concern and op-ed pieces and news stories and really very challenging things being said about the integrity of this Division that you manage?

Mr. KIM. Well, Senator, I find it unfortunate because, first and foremost, I supervise a great team of folks and they are doing hard work, and I do not like to have their work reflected in a negative way. And, obviously, if it is the fault of some people in the political ranks, then we bear accountability for that.

There is an investigation, and I expect it to be a thorough, full, and fair investigation, and I think we should all wait—there have been a lot of allegations. Many of them have been anonymous. I think we should wait to see what the results of that investigation are before drawing judgments. But all I can do, Senator, is my level best to tell you that I do not agree with a lot of what people have been doing or have been said to do. And I try to turn square corners in the way that I manage the division.

Senator WHITEHOUSE. I have got you.

Mr. Chairman, may I ask one last question?

Senator CARDIN. You may proceed.

Senator WHITEHOUSE. There has been some information that United States Attorney Griffin, before he was appointed United States Attorney and had a political role, was engaged in voter suppression tactics. There is an e-mail that uses the word "caging." I assume you are familiar with what "caging" is as a voter suppression strategy.

Mr. KIM. I am.

Senator WHITEHOUSE. OK. And there were sort of inexplicable lists of, you know, low-income minority voters that would appear to have been part of a caging strategy. My question to you is a very simple one. We know that information about this came to the attention of political officials within the Department of Justice in the course of Mr. Griffin's screening to become a United States Attorney. Was anything related to his participation in the caging effort

or the existence of the underlying caging effort ever forwarded to your Division for evaluation or investigation or review?

Mr. KIM. Senator, I am not aware of anything that predates the letter that I understand that you sent to the Department of Justice earlier this week. Quite frankly, I don't believe I have ever met Tim Griffin, and I had not even heard about him until he became the U.S. Attorney for the Eastern District of Arkansas.

Senator WHITEHOUSE. So as far as you know, when this came to the attention of senior officials within the Department of Justice, it was never brought to the Civil Rights Division's attention by them?

Mr. KIM. Senator, I am not aware of it, but I would like to double-check and make sure. There are a lot of things that I am not aware of that happen in the ordinary course of events. I would like to have the opportunity to double-check that and get back to you. But as I sit here right now, I have no recollection of that.

Senator WHITEHOUSE. Thank you.

Mr. Chairman, thank you. I appreciate the time of Senator Kennedy and Senator Hatch.

Senator CARDIN. Mr. Kim, I would just follow up briefly on Senator Whitehouse's point. I urge you not to wait, as I said a little bit earlier, on the report from the Inspector General. I think that you need to take action now. You have already indicated that you are. Some of these allegations occurred when you were Deputy. So I think these are serious concerns, and I think the way that Senator Whitehouse worded it is accurate. If it did not occur, then we need to correct the record. If it did occur, then we have to make sure that it will not happen again. And I think these are important issues that you are now in charge and you need to make sure that you follow up on what you have been saying here so that there is the clear directive to everyone in the Department about how you are operating that agency.

I want to give you one more example, if I might, which is the clearance of the Georgia law requiring voter identification. Now, I give you this example because here is an example where the preclearance was opposed by the career attorneys and overruled by the political appointments. And, of course, ultimately it was struck down by the courts. And to me it is kind of obvious that this is something that you ought to be very, very cautious about, voter ID and the impact it has on minority voting in the State of Georgia.

So that is why I think you see the press reports that there appears to be a political motivation overriding career workers who have been in the vineyard a long time trying to ensure full participation by minority voters, and that went forward. It was reversed by the courts. But why did it ever happen? You are indicating that you do not do things unless you have had full consultation with your staff and your career people. Here is one where evidently the political appointees overruled it and were wrong.

Mr. KIM. Well, Senator, I want to make sure you understand my previous statement, or make sure that I said it correctly.

With respect to personnel actions, that is what I was referring to in the context of I want a consensus.

Senator CARDIN. I thought you meant all important actions. So you do not—if you have an important decision—

Mr. KIM. Let me get to the—let me get to the second part of it, which is all litigation decisions, all other things that happen in the Division, I have a full and candid discussion about those legal issues with everyone involved, and certainly the recommendation of the section is extremely important to me, and we have full and fair and candid discussions, I think, about those.

I do not agree on every single one of those. I would say that I agree on the vast majority of those.

Now, I am happy to comment upon the Georgia matter as I understand it, but that was a decision that was issued before I became the Assistant Attorney General and in which I had no involvement.

Senator CARDIN. I believe that there were two such preclearances in 2005 and 2006, I have been told by staff.

Mr. KIM. That is correct. The Georgia identification matter was first submitted and decided sometime in the summer of 2005. And then it was amended and precleared again, the amendments were precleared in, I believe, early 2006—I want to say February or March. The amendments that were precleared were ones that, for example, made the ID free, increased the number of places across the State where one could get the ID, and I think commissioned an education program to educate people about—

Senator CARDIN. And the career individuals at the Civil Rights Division recommended against that?

Mr. KIM. Senator, we do not comment upon internal deliberations, but I will say that with respect to the preclearance letter in the first submission and the second submission, they were signed by the person who had authority to issue the preclearance, which was the career section chief.

Senator CARDIN. Well, all I can tell you, it has been widely reported that the career attorneys opposed it, and that adds to the types of articles that have appeared in the paper and the confidence in the Department of Justice.

Senator Hatch.

Senator HATCH. I would be happy to defer to Senator Kennedy.

Senator CARDIN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman, and I apologize for missing the earlier discussion. I thank Mr. Kim for being here today, and he represents, I believe, one of really the most important agencies of Government, and that is the Civil Rights Division. The great challenge of our society is to be a fair country and knock down the walls of discrimination, and it has been a hard and painful road that this Nation has followed and is continuing to follow. And there is still strong evidence of prejudice and discrimination and bigotry that is out there.

So the Civil Rights Division, not that it in and of itself is going to solve these issues or questions, but it has to be the kind of agency that has the kind of respect, I think, for people in this country that understands that we are a Nation unfulfilled until we are really going to deal with these issues and questions in a timely way and be a fair and a more just Nation. So it is an enormous responsibility that you have.

I was just—and I am going to come to my question—disappointed, as Senator Cardin pointed out. The issue was so clear

on the Georgia case because of the close association with requirements of needy people, underserved people to pay for their ability to be able to have the identity card to be able to vote. If that did not ring in as a return to the poll tax, it is difficult for me to understand it as one who was very much involved in the whole debate on the issues of poll tax.

The Texas redistricting was the same kind of issue, and the career officers were all supported by the Supreme Court decision. So the point that the Chairman makes is powerful.

This hearing was called, and it is extraordinary because we have a front-page story. Perhaps others have gone through this, but the front-page story from the Justice Department, I am sure you are familiar with it.

Mr. KIM. I have read it.

Senator KENNEDY. I apologize if others have gone into some detail on it, but I think all Americans had to be appalled. Read the article about this Civil Rights Division, the most, I think, important Division in the Justice Department. And it paints a picture of Division run amok because of partisan politics. And according to the article, Bradley Schlozman, former high-ranking official, imposed a partisan litmus test on the career Division attorneys, transferring the three female attorneys—their name are listed in the first column here—transferring the three female attorneys with stellar records apparently because they were perceived as Democrats, and Mr. Schlozman reportedly said he was transferring them to "make room for some good Americans." "Good Americans."

In the Appellate Division, one of the Division's most high-profile litigating section, he also went after Republicans who thought they were not "loyal Bushies," questioned whether he could trust one career lawyer who voted for Senator McCain in a Republican primary.

I have asked you many times about your own involuntary transfer of Robert Berman, the deputy chief who advised against the approving of the discriminatory Georgia voter ID law. But your explanations have come back—I do not find them very satisfactory. I will ask that they be made a part of the record, Mr. Chairman.

Senator CARDIN. Without objection.

Senator KENNEDY. The issues we have been discussing today are the equivalent of a five-alarm fire, and I want to know—I know you have perhaps responded, but I want to hear it—about what you are going to do to stop it. It is not acceptable to deny the obvious problem. It is not acceptable to say the problem began on someone else's watch. You head the Division. You show the American people that you will be part of the solution and not the problem. Confidence in the Division will require that you are going to do things differently.

Now, what are you going to do?

Mr. KIM. Well, Senator, I do hope I have done things differently, and I hope I have done things the way I think they should be done, which in my view is the right way, from day one after this Committee confirmed me and after I was sworn in to take office in November of 2005.

I have always valued the input of career section management in the personnel decisions that I have made. And I will say that as

a career attorney for many years before I became a political appointee, I tried hard to respect them, to make sure that the personnel practices that I employed were consistent with the ones that I wish were employed when I was a career attorney and ones that I felt—

Senator KENNEDY. Well, is this going on?

Mr. KIM. Senator, I—

Senator KENNEDY. I mean, when you read the paper today, did you say, "It is all news to me"?

Mr. KIM. Senator, I was shocked by some of the allegations in the paper.

Senator KENNEDY. What is the first thing you did? This is on your watch. What is the first thing? You read that. It is your watch, your Division. You are coming up here this afternoon. What is the first thing you do?

Mr. KIM. Senator, to be fair, I learned about the allegations or some of the allegations last night when it was communicated by the Office of Public Affairs. So it was not the first time—

Senator KENNEDY. Fine. OK. So then what do you do?

Mr. KIM. What I did was prepare to come to the hearing today—

Senator KENNEDY. Well, how do you—I mean, who did you talk to over there? How did you find out whether these things are true or were not true?

Mr. KIM. Well, Senator—

Senator KENNEDY. What did you—what was your own sense of outrage about this? This is the Department to preserve and protect the civil rights of American citizens. What is your reaction? You saw this or heard about it last night. What are the things—rather than just prepare for the hearing, what did you do?

Mr. KIM. Senator, some of the things have been done already, to be fair. With respect, not referring to individual people in a public forum, some of the management decisions of a personnel matter that Mr. Schlozman is alleged to have made, I have made differently. Some people who were removed from the section are back in the section based upon decisions that I have made starting from more than a year ago.

Senator KENNEDY. Well, when you read that Mr. Schlozman—and I know that time is moving on, Mr. Chairman. Schlozman reportedly said he was transferring them to "make room for some good Americans." What did that say to you?

Mr. KIM. Senator, at a very minimum, those were intemperate and inopportune remarks. I mean, I think it is fair to say that they caused me some concern, and I think it is also fair to say that there is an OIG and an OPR investigation into that hiring practice and those hiring practices.

Senator KENNEDY. Well, you know, the list goes on—"loyal Bushies." I want to get into one other area. I understand you have promised personally to investigate this and report back in 30 days. I hope the report provides the specific information on how you are going to ensure that the partisan game playing, both in personnel and case decisions, ends. I hope that will be included.

Mr. KIM. Senator, I don't mean to quarrel with you. I am not sure that I have made an assurance to investigate, and I do not

know that it would be appropriate for me to do so given that OIG and OPR are currently investigating some of these subject matters.

What I have pledged to do is to communicate clearly, at the request of the Chairman, my standards, which I hope are clear, to the leadership of the Civil Rights Division as to what I am looking for and what I expect when personnel decisions are made.

Senator KENNEDY. Well, I would think, as the head of a Division—this happened on your watch on this thing—that you would want to get to the bottom of it yourself, just in terms of your own basic and fundamental integrity as being the head of the Division—

Mr. KIM. Senator, if I might—

Senator KENNEDY.—and to be able to deal with these kinds of issues.

Mr. KIM. Senator, if I may respond.

Senator KENNEDY. Yes.

Mr. KIM. I believe that most of the allegations that were reported in the paper today did not happen when I was Assistant Attorney General.

Senator KENNEDY. I am talking about now. In any event, how these are dealing and how you are assuring that they are not going on now.

Mr. KIM. Senator, I have tried my level best to—

Senator KENNEDY. Let me move on to another area, and then I am—on the record of the Division with regard to voting rights, there has been only one case alleging racial discrimination in voting on behalf of African-Americans in this administration. One case. One case. One case.

You filed the same number of cases alleging discrimination against whites. Why is it? What can you tell us, this Committee—

Mr. KIM. Senator, I—

Senator KENNEDY.—if there is one case in terms of African-American voting, in terms of this country? Is that—what are we supposed to conclude from that?

Mr. KIM. Senator, I don't believe that is an accurate factual statement.

Senator KENNEDY. Well, what is the number then?

Mr. KIM. I have approved one case involving vote dilution on behalf of African-American—

Senator KENNEDY. What do you think? Do you think it is more than 15 or less than 5?

Mr. KIM. With respect to race—

Senator KENNEDY. The number of cases, voting rights cases.

Mr. KIM. Race cases in general.

Senator KENNEDY. Voting rights cases with regards to African-Americans.

Mr. KIM. Under the Voting Rights Act?

Senator KENNEDY. Yes.

Mr. KIM. I believe it is between 5 and 15.

Senator KENNEDY. You believe it is between 5 and 15. So if it is between 5 and 15—that is what your testimony is?

Mr. KIM. That is what I believe, Senator. I mean, I could provide an accurate—

Senator KENNEDY. Yes, would you provide the—

Mr. KIM. Of course. Of course.

Senator KENNEDY. Because I think you will find out that it is considerably less. I think you will find out that with regards to the record of the Civil Rights Division on these kinds of cases, there has been a dramatic fall-off in very recent times on this kind of thing, and I would like to know why. And if you can be able to help us understand if there has been that drop-off, what the reasons are for it, whether it is because we have been making progress or because of the fact that the Department has not chosen to go ahead, I would appreciate it.

Mr. KIM. Senator, my commitment to enforcing all the laws neutrally to the best of my ability is one that I have made before the Committee and one that I reiterate today. I have tried very hard to make sure that we are enforcing all the statutes across our jurisdiction with respect to all Americans. And the one lawsuit that you may be referring to, a vote dilution lawsuit under Section 2 of the Voting Rights Act, was authorized by me against the city of Euclid shortly after I became Assistant Attorney General. I have also authorized Section 2 lawsuits on behalf of Hispanic Americans. I have authorized voting rights lawsuits on behalf of many different minority groups, including for the first time ever Koreans. And my job, I think, is to try to fairly enforce the laws on behalf of everyone, and I can categorically assure you, Senator, that I have no interest in not enforcing laws as opposed to any group of people. And to the extent that I find violations—and we have been working hard to find violations, and we have been working hard to solicit allegations—that is something that I think is part and parcel of our mission.

Senator KENNEDY. Finally, just on the time that you were—as I understand, you were in the Division the whole time that this allegedly evidently was going on. You were the Deputy Assistant AG for 3 years before becoming the AAG, and you were totally unaware that this was going on?

Mr. KIM. Senator, the type of specific allegations that are being raised are newfound, in my mind. I was a Deputy Assistant Attorney General along with two other Deputy Assistant Attorney Generals, a Principal Deputy Assistant Attorney General, and the Assistant Attorney General. In many respects, the DAGs moved on parallel tracks. I supervised my sections, and the other Deputies supervised their sections.

The type of specific allegations that are being alleged are ones that I was not aware of when I was Deputy Attorney General. To be fair, these are allegations—I know that Mr. Schlozman has come before this Committee and denied doing anything in violation of law, and there is an investigation that is pending that I expect to be thorough, and I expect to cooperate fully with that investigation, and I think all of us would benefit from waiting and seeing how those allegations shake out and trying to get to the bottom of this.

Senator KENNEDY. Thank you very much, Mr. Chairman.

Senator CARDIN. Thank you, Senator.

Senator Hatch.

Senator HATCH. I think you have more than adequately explained that you are doing the job down there, albeit that there may have been some cases to protect whites from voter discrimination. I mean, I guess they are entitled to protection, too, although

I am not sure, listening to some of my colleagues. But I hope that nobody, whether it is disabled people, veterans, whoever it may be, religious people, will have their rights trampled on.

I think you have more than adequately explained that you are making sure or doing your dead level best to make sure that all rights are protected and that you abide by the statutes even though sometimes we up here disagree with our own statutes. One side or the other disagrees from time to time. Your job is not to just do what you might want to do. Your job is to enforce those statutes, and I think you have more than adequately explained that here today, and personally, I am very proud of you. You served this Committee well when you were up here, and I happen to know that perhaps better than anybody else on the Committee. But a lot of others on this Committee have admitted that, too. And I just have to say that it is a tough job you have, but keep doing it to the best of your ability. And we expect discrimination to be fought against—it is just that simple, no matter who it affects—in accordance with the statutes that we have enacted up here. And you have made that commitment, and I personally appreciate it and personally back you.

So thank you for being here, and that is all I need to say.

Mr. KIM. Thank you, Senator.

Senator CARDIN. Mr. Kim, I would ask that you make available to the Committee the communication that we have talked about to staff as to the practices within your Civil Rights Division.

And, second, there seems to be some disagreement on the turnover, experience of staff, demographics, et cetera, so if you could make available to us the length of service within the Civil Rights Division of your employees and their background within civil rights, I think that would be helpful so that we can just get a level playing field. The information we had showed that your staff has less experience and more turnover than historical numbers, and I think it would be helpful to get the facts on that from you so that we can be able to look at the records rather than each of us subjectively claiming what the circumstances are.

Mr. KIM. Mr. Chairman, with respect to the first request, I have no problem committed to do that.

With respect to the second request, consistent with personnel privacy protections, I will endeavor to make sure that you get the information you have requested.

Senator CARDIN. Thank you. Also, the other point that I think I mentioned earlier—and Senator Kennedy mentioned it—you are the agency that we look upon for opportunity for all Americans. There have been press accounts as to the lack of diversity within the Civil Rights Division, and if you could—I am not suggesting you do this by individual, but if you could give us the diversity numbers within the Department, I think that would be very helpful for us, too.

Mr. KIM. I will be happy to provide that, Senator.

Senator CARDIN. Thank you.

Is there anything further for Mr. Kim? If not, again, I thank you very much for your attendance here today.

Mr. KIM. Thank you very much, Mr. Chairman.

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[The prepared statement of Mr. Kim appears as a submission for the record.]

Senator CARDIN. Our next panel will consist of Wade Henderson, who is the President and CEO of the Leadership Conference on Civil Rights; Brian Landsberg, who is a professor at McGeorge School of Law, University of the Pacific in Sacramento, California; Helen Norton, Visiting Assistant Professor, School of Law, University of Maryland, Baltimore, Maryland—my alma mater. It is nice to have somebody here from the University of Maryland School of Law. And Roger Clegg, President and General Counsel, Center for Equal Opportunity, Falls Church, Virginia; and Robert Driscoll, Partner, Alston & Bird, Washington, D.C.

I should have asked you before you sat down. If you would please rise for the—as a tradition of our chairman, we swear in our witnesses. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HENDERSON. I do.

Mr. LANDSBERG. I do.

Ms. NORTON. I do.

Mr. CLEGG. I do.

Mr. DRISCOLL. I do.

Senator CARDIN. Thank you. Please be seated and, again, welcome to the Committee. We very much appreciate your presence here. Your full statements, as I have indicated earlier, will be made part of the record of our Committee. You may proceed as you see fit. We will start with Mr. Henderson.

STATEMENT OF WADE J. HENDERSON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WASHINGTON, D.C.

Mr. HENDERSON. Thank you, Mr. Chairman, and good afternoon. My name is Wade Henderson. I am the President of the Leadership Conference on Civil Rights. The Leadership Conference is the Nation's leading civil and human rights coalition, with 200 national organizations working to build an America as good as its ideals. It is a privilege to represent the civil rights community in addressing the Committee today.

Now, today's article in the Washington Post, which has been alluded to by several Senators today, about politically motivated hiring and firing of career civil servants in the Civil Rights Division at the Department of Justice is just the latest in a string of news reports that have revealed that the Division has abandoned its long tradition of fair and vigorous enforcement of our Nation's civil rights laws. Partisanship, it seems, has been driving both substantive and personnel decisionmaking. In its 50-year history, never before has the Civil Rights Division faced such a challenge. In those 50 years, through both Republican and Democratic administrations, the integrity of the Division has never been questioned to this degree. Not even close. Members of the committee, we must turn this ship. We expect a Civil Rights Division that enforces the Nation's civil rights laws, without fear or favor. We must demand accountability and a return to vigorous enforcement.

Now, over the last 6 years, we have seen career Civil Rights Division employees, section chiefs, deputy chiefs, and line lawyers forced out of jobs to make room for what one political appointee within the Division described as "good Americans." You heard Senator Kennedy allude to it in his remarks today. We have seen retaliation against career civil servants for disagreeing with their political bosses. We have seen whole categories of cases not being brought and the bar made unreachable high for bringing suits in other cases. We have seen some outright overruling of career prosecutors for political reasons and also many cases being "slow walked," to death.

In the Housing Section alone, the total number of cases files has fallen 42 percent since 2001, while the number of cases involving allegations of race discrimination has gone down by 60 percent. The Voting Section did not file any cases on behalf of African-American voters during a 5-year period between 2001 and 2006. And no cases have been brought on behalf of Native American voters for the entire administration.

Furthermore, the Department has gone out of its way to take legal positions to roll back civil rights. For example, last year the Department filed amicus curiae briefs in support of the dismantling of voluntary school integration programs in Seattle, Washington, and Louisville, Kentucky. These cases, which challenge one of the few ways left for local school districts to battle de facto segregation in public schools, are currently pending before the U.S. Supreme Court.

The Division's record on every score has undermined effective enforcement of our Nation's civil rights laws, but it is the personnel changes to career staff that are in many ways most disturbing. For it is the staff that builds trust with communities, develops the cases, and negotiates effective remedies. Career staff has always been the soul of the Division, and it is now under attack.

The blueprint for this attack appeared in an article in National Review in 2002. The article—entitled, and I quote, "Fort Liberalism: Can Justice's Civil Rights Division be Bushified?"—argued that previous Republican administrations were not successful in stopping the Civil Rights Division from engaging in aggressive civil rights enforcement because of the "entrenched" career staff. The article proposed, again, and I quote, that "the administration should permanently replace those [section chiefs] it believes it can't trust," and further, that "Republican political appointees should seize control of the hiring process," rather than leave it to career civil servants. This is a radical change in policy. It seems that those running the Division got the message. To date, four career section chiefs and two deputy chiefs have been forced out of their jobs.

Fifty years ago, the attempt to integrate Little Rock High School demonstrated the need for the Federal Government to finally say "Enough." Enough of allowing the states to defy the U.S. Constitution and the courts. Enough of Congress and the executive branch sitting idly by while millions of Americans were denied their basic rights of citizenship. The 1957 Civil Rights Act and the creation of the Civil Rights Division were the first steps in responding to a growing need.

For years, we in the civil rights community have looked to the Department of Justice as a leader in the fight for civil rights. In the 1960s and 1970's, it was the Civil Rights Division that played a significant role in desegregating schools in the old South. In the 1970s and 1980s, it was the Civil Rights Division that required police and fire departments across the country to open their ranks to racial and ethnic minorities and women. It was the Civil Rights Division that forced counties to give up election systems that locked out minority voters. And it was the Civil Rights Division that prosecuted hate crimes when no local authority had the will.

Members of this Committee, we must continue to work to understand the extent of the damage that has been done to the Civil Rights Division and hopefully develop a road map for our way back to vigorous enforcement, integrity, and justice—and to a Civil Rights Division the Nation can again be proud of.

Thank you very much.

[The prepared statement of Mr. Henderson appears as a submission for the record.]

Senator CARDIN. Thank you, Mr. Henderson.

Professor Landsberg.

STATEMENT OF BRIAN K. LANDSBERG, PROFESSOR, MCGEORGE SCHOOL OF LAW, UNIVERSITY OF THE PACIFIC, SACRAMENTO, CALIFORNIA

Mr. LANDSBERG. Thank you, Chairman Cardin and Senator Hatch. Thank you for inviting me to testify. My understanding is that I am to provide a historical perspective on the Civil Rights Division of the Department of Justice, and I have provided the Committee with a statement.

I worked at the Civil Rights Division for over 20 years beginning in 1964 under six administrations, and my scholarship includes two books about the work of the Division. I am proud of the contribution that the Division has made to equal rights under the law that Mr. Henderson just summarized for us.

Any historical perspective must mention the important role of the Department of Justice in enforcing equal rights during Reconstruction as well as the country's abandonment of Reconstruction resulting in reinstatement of a racial caste system in which law and customs supported white subordination of blacks. Some supporters of equality under the law fear that the second Reconstruction—the civil rights advances since 1954—will meet the same fate as the first.

The Civil Rights Division began in 1957 with a narrow mandate, which has grown substantially over the years. Congress, however, has consistently seen the Division as an enforcer of the public interest in eradicating discrimination based on race and other invidious classifications. Unfortunately, the widespread laws and customs enforcing race discrimination from the late 1870s to the 1960s have left a continuing legacy, and combating continuing race discrimination stands at the core of the Division's responsibilities today as it did in 1957.

The Division developed proactive enforcement techniques starting late in the Eisenhower administration and refined under Presidents Kennedy and Johnson. Its lawyers went out into the field to

uncover unlawful discrimination. Their recommendations received rigorous review by and discussion with the Division leadership. The Division traditionally gave high priority to combating discrimination against African-Americans because the racial caste system was viewed as destructive of American ideals and as undermining our society and economy.

The Division, like most Federal agencies, is composed of career personnel and political appointees. Its success depends upon the ability of the two groups to work together.

When the Presidency changes hands, there is inevitably a period of adjustment. Ironically, the incoming political appointees view the career attorneys as holdovers from the prior administration, even though long-term attorneys may have worked through several administrations under Presidents from both parties. Most career attorneys, however, have normally been hired through the Attorney General's Honors Program, instituted during the Eisenhower administration to ensure that lawyers were hired based on merit rather than on ideology, political affiliation, or other throwbacks to the spoils system. They are dedicated to law enforcement. They understand that priorities may change from one administration to the next. They have been trained to turn square corners, as Mr. Kim mentioned earlier, in their work to honestly evaluate the law and the facts. Both civil servants and political appointees need to have the courage to say no to political pressures. The Division works best when it operates in an atmosphere of mutual respect between career staff and political appointees. Proper interaction between them ensures that neither group will carry out an improper agenda. This will enhance the Division's credibility with the courts and the public.

In closing, let me emphasize the importance of careful prioritizing of the Division's responsibilities. While the many new responsibilities that Congress has assigned to the Division over the years deserve attention, the core responsibilities Congress has assigned relate to discrimination based on race, national origin, sex, and disability in voting, schools, housing, public accommodations and facilities, federally assisted programs, and employment. In my view, racial discrimination is a core disease in this country, and the future of civil rights enforcement requires that combating race discrimination remain as a central priority.

Thank you.

[The prepared statement of Mr. Landsberg appears as a submission for the record.]

Senator CARDIN. Thank you very much, Professor Landsberg.

Professor Norton.

STATEMENT OF HELEN L. NORTON, VISITING ASSISTANT PROFESSOR, UNIVERSITY OF MARYLAND SCHOOL OF LAW, BALTIMORE, MARYLAND

Ms. NORTON. Good afternoon, Mr. Chairman, Senator Hatch. My name is Helen Norton, and I am a visiting professor at the University of Maryland School of Law. As a political appointee in the Civil Rights Division from 1998 until January of 2001, my duties included service at the Deputy Assistant Attorney General charged with supervising the Employment Litigation Section. So my testi-

mony today will focus on the Civil Rights Division's Title VII enforcement efforts.

As you know, Congress empowered the Department of Justice with the power to enforce Title VII with respect to State and local government employers, and this authority is critically important, as State and local governments employ more than 18 million workers in a wide variety of jobs, from police officers, to teachers, firefighters, health care providers, and more. Some of these jobs offer entry-level gateways to employment and economic security, while others stand at the top levels of State and local leadership.

But despite the importance of this mission, the Division's Title VII enforcement efforts have plunged since January 20, 2001.

I would like to make just two points today.

First, the Division's measurable Title VII activity has declined substantially and across the board. We have seen a significant drop in activity of all types: fewer successful resolutions, fewer cases filed alleging systemic discrimination, fewer cases filed alleging individual discrimination.

For example, one especially valuable enforcement measure examines the number of successful resolutions secured through judgments, consent decrees, and out-of-court settlements. These resolutions further Title VII's objectives by providing compensation to discrimination victims and securing changes to employers' discriminatory practices. But since January 20, 2001, the Division has resolved only 46 Title VII cases, including only eight pattern and practice cases. In contrast, the Division during the Clinton administration resolved approximately 85 Title VII complaints, including more than 20 pattern and practice cases.

Another helpful enforcement measure tracks the number of complaints filed under Title VII. So long as illegal job discrimination remains a problem, we should expect to see continued case filings. Here, too, the Division's efforts fall short. The Division has filed a total of only 39 Title VII complaints since January 20, 2001. At this pace, the Division can be expected to file approximately 49 cases over two full terms, and this is just over half of the nearly 90 Title VII complaints filed during the Clinton years.

Second, the Division's record reveals a retreat from its historic leadership in the fight against race and national origin discrimination as its Title VII docket, which is now significantly reduced, devotes an even smaller proportion of its resources to job discrimination experienced by African-Americans and Latinos.

For example, the Division under this administration has brought significantly fewer pattern and practice cases, challenging systemic discrimination that has the capacity to affect large numbers of workers. But of this already shrinking docket, the number of cases challenging systemic discrimination experienced by African-Americans, Latinos, and women has plummeted to less than a third of what it was previously.

Turning to its Title VII docket on behalf of individual victims, the Division has filed only 28 individual complaints of discrimination since January 20, 2001. At this pace, the Division will file approximately 35 such cases over two full terms. Again, this is just half of the nearly 70 individual claims filed during the previous administration.

And while the current administration has brought significantly fewer individual claims of all types, this is especially true of claims on behalf of African-Americans, religious minorities, and Latinos. And, in fact, during this administration, the Division has yet to file an individual Title VII claim on behalf of a Latino.

Now, this downturn in Title VII enforcement activity is all the more troubling given the greater resources now available to the Employment Litigation Section. On average, 35 to 36 attorneys have been assigned to that section during the Bush Administration, compared to only 30 to 31 during the previous administration.

One last note, Senator Cardin. You expressed concern about the Department's position in the *Ledbetter* and *Burlington Northern* cases, and I share that concern, and here is why. In both of those cases, the Department did file amicus briefs in the Supreme Court, but in both of those cases the Department took pains to repudiate the EEOC's longstanding interpretations of Title VII that actually interpreted the statute in a way that furthered its objectives of providing compensation to discrimination victims and deterring future discrimination. In both of those briefs, the Department of Justice argued that the EEOC's position was not entitled to deference and instead argued for a considerably more cramped understanding of Title VII. In *Burlington Northern*, as you pointed out, eight Justices of the Supreme Court rejected the Department's position. In *Ledbetter*, by a 5–4 decision, the majority shared the Department's position over a spirited dissent by Justice Ginsburg, and Members of Congress have already introduced legislation to try to change the effects of that ruling. But the troubling thing to me is that in both cases, despite the fact that the agency got charged by Congress with lead enforcement over Title VII, the EEOC had a longstanding position that it had argued successfully in a range of lower courts that that position was abandoned by this Department.

Taken together, these developments represented a disturbing retreat from the Department's historic commitment to vigorous enforcement of Title VII. I appreciate your attention to these issues and the opportunity to testify today, and I look forward to any questions that you may have.

[The prepared statement of Ms. Norton appears as a submission for the record.]

Senator CARDIN. Thank you, Professor Norton.

Mr. Clegg.

STATEMENT OF ROGER CLEGG, PRESIDENT AND GENERAL COUNSEL, CENTER FOR EQUAL OPPORTUNITY, FALLS CHURCH, VIRGINIA

Mr. CLEGG. I have a real sense of deja-vu in listening to the testimony today. I was also a political deputy in the Civil Rights Division for 4 years, from 1987 to 1991, and what we are hearing are basically the same three kinds of criticism of the Division I used to hear. Some members of the Committee say the Division is not bringing enough of the kinds of cases they would like. Some members are saying that the Division is bringing too many of the cases that they don't like. And some members are saying that in the hiring process, and in other ways that the political appointees deal with career lawyers, the Department has become politicized.

It is entirely appropriate, since Congress appropriates money for the Division and wants it to enforce the laws that it has passed, for it to keep an eye on what kind of a job the Division is doing, so long as the oversight process does not become so onerous that it actually prevents the Division from doing its job.

If the members don't agree with the Division in the way it is interpreting the law or don't like the enforcement priorities that it has set, they can certainly argue with the Division leadership about it. But, of course, ultimately the call is the executive branch's.

There will be legitimate differences of opinion among members of the Committee, between members and the administration, and between political and career lawyers in the Division about how to interpret the civil rights laws. Judges don't interpret laws the same way, and neither do Government lawyers. And, of course, outside groups like mine will sometimes be critical of the Division. I criticized the Division the Clinton administration, and I have criticized it during the Bush administration. Many of you think the Division has been too conservative. I think it has not been conservative enough.

There will also be differences of opinion, again, among members of the Committee, and between members of the Committee and the administration, and between the political appointees and career lawyers in the Division about how to set law enforcement priorities. The lack of enthusiasm that the Clinton administration had for challenging affirmative action discrimination had to do, I suspect, not only with a difference of opinion in how it read the law, but also with a belief—which I believe is misguided, but was their sincere belief—that fighting such discrimination is just not as important as other items on its agenda. The Bush administration's greater care in bringing disparate impact cases may reflect, again, not just a difference in how it reads the statutes, but also in a belief that, say, human trafficking is a more pressing problem than, for instance, a fire department's alleged overemphasis on one kind of physical conditioning or another.

In addition, even without differences in law enforcement philosophy, the Division's priorities will change over time. Congress passes new laws. Lawbreaking will become more common in some areas and less common in others.

As Mr. Kim explained, for instance, this administration has spent much time enforcing the Help America Vote Act, which was just passed in 2002. New statutes often require a great deal of enforcement attention, to educate the people that are going to be affected by their requirements. There are a variety of other statutes that you all have only recently passed.

Now, some of you all have criticized the Division for concentrating proportionately fewer resources than in years past on bringing cases that allege discrimination against African-Americans. But even accepting arguendo that there has been such a decline—and I think Mr. Kim would suggest that there has not—you have to bear in mind that the Division has a lot more laws now to enforce than it did 40 years ago; and, I will say, that discrimination against African-Americans is less pervasive now in 2007 than it was in 1967.

Just to give one example, we would hardly expect a southern city to discriminate to the same degree in its municipal hiring today—when African-Americans, because of the success of the Voting Rights Act, have more political power and may even constitute a majority of the city council and other municipal offices, including mayor—as when the city government was lily white and black people were not allowed to vote.

Now, I am not saying that anti black discrimination has vanished; it hasn't, and there will always be bigots, of all colors, in a free society. But anybody who thinks that anti black discrimination is the same problem in 2007 that it was in 1967 is delusional.

I think I am going to stop with that. Again, I think it is important to bear in mind that there are legitimate differences in opinion between political appointees (who, in a Republican administration, tend to be conservative) and career lawyers in the Civil Rights Division (who naturally tend to be left of center). And there is nothing sinister or scandalous about those differences in enforcement philosophy.

Thank you.

[The prepared statement of Mr. Clegg appears as a submission for the record.]

Senator CARDIN. Thank you, Mr. Clegg.

Mr. Driscoll.

STATEMENT OF ROBERT N. DRISCOLL, PARTNER, ALSTON & BIRD LLP, WASHINGTON, D.C.

Mr. DRISCOLL. Thank you, Mr. Chairman and Senator Hatch, for inviting me to testify. My name is Bob Driscoll, and I, too, was a political deputy in the Civil Rights Division from 2001 to 2003, when John Ashcroft was the Attorney General during that time period.

When I was preparing my testimony, I had to guess as to what questions were going to come up for Mr. Kim, and I guessed correctly, if you read my written submission, so I wanted to address three issues that I think are on the mind of the Committee. The first is the relationship between the career and the political appointees.

The stories I have read and even heard today from the panel and the Committee seem to focus on allegations that Civil Rights Division employees were either overruled or interfered with by political appointees when the Division took a particular position in litigation or with the Section 5 preclearance under the Voting Rights Act. While I am familiar with my own experience in the Division—and I wasn't at the Division for some of the events that have been questioned—I do think these stories and questions misperceive this relationship and how it should properly function.

As with every Division of Justice, the career staff carries out the day-to-day operations of the Division, and they are certainly the most experienced people in the Division in certain areas, and they make recommendations to political appointees to open cases. And there is no question that the career staff is where the institutional knowledge typically resides in the Division. However, it is the Assistant Attorney General for Civil Rights and the leadership of the Department that are ultimately responsible for the actions of the

Division, and various AAGs who have appeared before this Committee over the years have been questioned extremely sharply by members of the Committee about the actions they have taken. And so it is a tremendous responsibility for those appointees to sit before the Committee and explain the Division's position.

Because of that responsibility, the AAG and his or her political staff must independently review all the recommendations that come before them. And as anyone knows who has done an independent review, sometimes there will be a disagreement, and there is nothing inherently wrong with this. I agree with Roger completely.

Indeed, I think the Committee wouldn't react well if Assistant Attorney General Kim came before you and testified that every decision he made that was controversial, he had simply rubberstamped the recommendation given to him by the career staff, who is very experienced, and that he had nothing to say about it and that, therefore, he wasn't responsible. And I think the Committee would be appropriately angry with Assistant Attorney General Kim if he took that position.

Similarly, when the Division makes a mistake—and I will recall now the case in Torrance, California, that received a lot of attention from this Committee in the past administration when the Division was sanctioned almost $2 million for overreaching in an employment discrimination case against State jurisdiction—it would be no excuse for the AAG to say, "I was merely following the recommendations of the career staff." The AAG has to convince him- or herself that the facts and the law are on their side. So that, therefore, it seems to me the important question that the Committee should be focusing on in a given area is not whether any particular decision was made with the political and career staff in agreement, but whether that decision was in the end correct. And from what I have seen, the courts have largely agreed with the positions taken by AAG Kim and his predecessors. And members of the Committee might disagree with those decision. They might agree with the court decisions. But there is little indication that the Division has been sailing beyond the markers in terms of legal theories it has been pursuing or positions that it has been taking in court. And that to me is a much more important question than whether or not there has been disagreements between the political staff and the career staff.

I would also like to address briefly setting of priorities and, in particular, the criticism I have read in the New York Times of the Division's emphasis on human-trafficking and religious discrimination cases as a shift away from traditional civil rights enforcement. I think these criticisms are generally unfounded and take an unnecessarily cramped view of what the Civil Rights Division should be doing.

As an initial matter, as Senator Hatch noted, new statutes get passed all the time, and these statutes provided new weapons to combat both religious discrimination and human trafficking. So it is natural that enforcement in those areas went up when the Bush administration came into power. More importantly, both President Bush and General Ashcroft, under whom I worked, made clear that combating religious discrimination was a priorities, and that is per-

fectly appropriate for them to do. Some may disagree with it, but it was perfectly appropriate for the political leadership to direct the Division to emphasize those cases.

So when I served in the Division, we made it a priority. We created the position of Special Counsel for Religious Discrimination. Eric Treene was hired. He has done a great job in that role. And the success rate of these cases is very high because, unfortunately, there is no shortage of governmental entities out there that don't understand the proper role religion can play in the public square. And I think most Americans are pleased to see this enforcement, and there is nothing wrong with the emphasis on these cases.

As to the question of whether this de-emphasizes traditional civil rights areas, I think this is unlikely for several reasons.

First, those cases are not prosecuted out of the Voting or Employment Section generally, and so if the Committee has questions about that, they can ask them, but it wouldn't be a diversion of resources. And, second, I think the notion that traditional discrimination suffers if non-traditional, to call it that, discrimination is enforced would cause us to cut back on disability cases, language-minority cases, police misconduct cases, clinic access cases, prison cases, juvenile facility cases, gender discrimination cases, and religious discrimination cases—I do not think anyone wants that. So I would like to just counter this notion that by enforcing religious discrimination cases vigorously there is necessarily a cutback in other areas.

Thank you very much.

[The prepared statement of Mr. Driscoll appears as a submission for the record.]

Senator CARDIN. Mr. Driscoll, thank you for your testimony, and I thank all of our witnesses.

Mr. Henderson, let me start, if I might, with your observations. You have an incredible record over an extended period of time working in the civil rights community and leadership in that area. You have had a chance to observe what is called "changing priorities after national elections," particularly when it is an administration of a different party. So we have seen over the 50-year history of the Department of Justice Civil Rights Division many changes of administrations and priorities within an administration.

I want to get your assessment, because we have heard a lot of accusations that have been made, about the effectiveness of this administration's Civil Rights Division as far as pursuing aggressively the rights, the important rights of minorities. I just want to get your assessment to whether this is just changes of priorities in different types of cases or whether we are looking at a different commitment to enforcing civil rights.

Mr. HENDERSON. Thank you, Mr. Chairman. I think it is an important question, and let me respond this way: Discrimination in violation of the law is abhorrent in any form. It is inconsistent with our notions of a fair and just society. It is inconsistent with what I think we all accept to be the meaning of "equal opportunity" in the 21st century.

The issue is not whether the Civil Rights Division is enforcing statutes that protect religious liberty or seek to protect the rights

of institutionalized persons or address the problems of victims of sexual trafficking.

Certainly each of these areas of the law or problems of decision require attention, and would not criticize the Department or Division for spending resources to address some of those issues. The question, however, is whether the Division is backing away from or perhaps even abandoning its primary responsibility to address problems that have proven to be among the most difficult and intractable in resolving in our society. Certainly issues of race, problems of national origin discrimination, certainly have been among the most difficult.

What we have seen within the Department is radically different today than we have seen over the past 50 years. Now, admittedly, we have had differences with administrations, both Democratic and Republican, in the handling of selected individual cases with which we might disagree. But as a general matter, there has been no criticism wholesale of either Democratic or Republican administrations of the Department of Justice's Civil Rights Division in the life span of this Division for the past 50 years, with the recent exception of some of the actions that have been taken and that are the subject of discussion today.

The example that I would use, which I think graphically demonstrates the difference in character between the kinds of experiences we have seen under this administration currently with what we have seen in the past, is the case that Senator Kennedy and others highlighted during the previous round. Let's take the Georgia voter ID statute.

Here we have a situation where career line attorneys, in evaluating the impact of a proposed statute requiring voter ID of prospective voters, challenged that statute under the assumption that it would harm persons protected under the Constitution who should be given the right to vote.

That career judgment was overturned, in large measure driven by one individual—Hans von Spakovsky, who happened to be counsel to the Assistant AG for Civil Rights—and perhaps others who are political appointees within the Division urging the Department to override the voices of its career attorneys and to side with the State in adopting a statute which many believed would be harmful. Fortunately, the courts challenged that statute and sided with those who criticized the implementation of the statute in the final analysis.

That example, it seems to me, is a graphic illustration of the nature of the politicization of the Department and the kind of thinking that we are challenging today. So the question is not whether the Division chooses to enforce statutes that fall within its purview or under its jurisdiction. The question is whether the administration and the Division is using that approach, that is to say, its desire to enforce statutes more broadly, as a subterfuge for shifting policy away from the enforcement of statutes that affect issues of race, issues of national origin discrimination, among the most difficult and intractable problems in modern society.

Senator CARDIN. Well, I thank you for that answer. I think the Georgia case is very illustrative. It is to me a kind of—I don't understand how the—it is clear to me it was political ill judgment by

individuals outside of the mainstream of the historic role that the Department of Justice Civil Rights Division has played because of the consistency of dealing with voter participation. So I think it is an example that is extremely troublesome, and Mr. Kim answered a lot of questions but didn't quite answer that one as to—because that happened under his watch, even though he said it didn't, because of the modification in 2006.

I am going to have additional questions, but let me yield to Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. This has been a really interesting hearing to me, as all of these civil rights hearings are. I mean, there are just different points of view, and they are important, by everybody.

Mr. Henderson, let me just mention one thing to you, and then I would like to turn to Mr. Clegg and Mr. Driscoll. You stated in your submitted testimony that between 2001 and 2006, "the only racial discrimination case brought by the Division under Section 2 of the Voting Rights Act was on behalf of white voters in Noxubee, Mississippi." Yet the Voting Section reports ten actions brought, at least in part, under Section 2 between 2001 and 2006. Now, only one of them was on behalf of white voters. Two were brought on behalf of African-American voters. That was in *U.S.* v. *City of Euclid* and *U.S.* v. *Crockett County*. Two were brought on behalf of, like I say, African-American voters. Seven more of them were brought on behalf of Hispanic Americans, including one that was also on behalf of Asian Americans. I will not list all those cases.

The statistics you cite starkly under count the actions brought by the Voting Rights Section, it seems to me, unless there may be some explanation I do not understand at this point.

Mr. HENDERSON. Thank you, Senator Hatch. Let me respond in the following way: I think Mr. Kim, before he left, at the conclusion of his statement was asked a question about how many cases had been filed under his tenure in this area. I think he cited perhaps between 5 and 15. Our review of the record of the Department of Justice, provided in large measure by its own materials, would suggest that only one case had been filed by—

Senator HATCH. You can see I have listed 10 here that they list.

Mr. HENDERSON. Right. Well, many of them are, in fact, holdover cases themselves that had been filed, but let me give you an example of what I am talking about.

When one thinks back on the 2004 Federal election, the State of Ohio often comes to mind as a graphic example of some of the problems on the ground in addressing issues of deceptive practices in which individuals, for example, issued fliers to communities, most often African-American communities, suggesting that the election day was some day other than the day it actually occurred, or instances in which eligible voters who happened to be Latino or themselves naturalized citizens were frightened with fliers that suggested that the Immigration and Customs Enforcement Agency might be lurking at the time of enforcement.

There were many examples of extended lines that required voters to wait hours, sometimes in the rain, before they could cast their ballots, and those lines, in fact, were created by discretionary decisions, but we had to allocate resources.

There were numerous instances of irregularities that I think shocked the conscience of most average Americans in thinking about how our system of democracy works and benefits the country as a whole. And yet to know that there have not been adequate investigations and/or charges brought either as a result of what occurred in Ohio or in some of the other jurisdictions where such documentation has occurred, it does seem to me is quite troubling.

While I think there may be some dispute as between ourselves and the Department on how they interpret cases to be filed, I think there can be no dispute that the Department failed to adequately address problems that were within their purview and available to be addressed by existing statutory authority. And so my sense is it misses the larger point, Senator Hatch. If we dwell on whether or not there have been one or two cases filed here or there, the question is whether in the broad sweep of the Department's responsibility, it is quite clear that the Department has stepped back from its ongoing responsibility to enforce the laws as they apply to all Americans.

Senator HATCH. Well, the reason I bring it up is because the Voting Section home page lists 12 cases. A couple of them were filed during the Clinton years, and there may have been others that were filed, but if you go by the years, they were filed during the Clinton years. All I can say is that, you know, there appear to be some differences here in the count.

Let me ask Mr. Clegg and Mr. Driscoll, I found Professor Norton's comments, her statistical comments, quite interesting and intriguing. Would either of you care to comment on Professor Norton's statistical standard that numbers should necessarily stay the same between administrations?

Mr. CLEGG. Well, I will, again, make the general statement that I made before. I think that Mr. Driscoll actually talks about the specific problems that can come up with this kind of bean-counting in his testimony, so I am going to defer to him. But I would say that, as a general matter, we would not expect the number of cases to be the same in every area of the law over time. Again—

Senator HATCH. The exact same type of statutes.

Mr. CLEGG. Right, because you all are constantly passing *more* statutes. The Division has limited resources. If it is devoting more resources to one area, then proportionately it is going to be devoting less to other areas, and there is nothing sinister about that. You started out in the 1960s, and people who were disabled were not protected from discrimination. People—

Senator HATCH. Well, let me ask you, there is a huge regular branch of civil servants who are there regardless of which administration. Can you imagine a case where, if they felt strongly a case should be brought as a group, that it would not be brought or it would not be given heavy consideration?

Mr. CLEGG. No, I can't, and that is a very good point, Senator Hatch. What is it that is being—

Senator HATCH. And they weigh in. They weigh in on these, don't they?

Mr. CLEGG. Of course.

Senator HATCH. I mean, they don't just sit there like puppets.

Mr. CLEGG. And, you know, what would be the reason that any administration would say that we are not going to bring discrimination cases when there has been discrimination against African-Americans? What possible motive could they have for that? I mean, even putting aside the fact that it would be immoral and wrong for them to do so, it would be politically crazy to do that. I can tell you that from when I was in the Civil Rights Division, and I think it was clear that this administration wants to—I mean, Republican administrations—of all administrations—bend over backwards to make clear that—they are committed to enforcing the civil rights laws and making clear that, they are not racist, that they are not bigoted, that they are ensuring that everybody is protected from discrimination. What would be the purpose for them to—is there some constituency that people think—

Senator HATCH. Well, they would get killed if they did not bring cases that clearly should be brought.

Mr. CLEGG. It is absurd. I think what—

Senator HATCH. What some of these articles are saying, you don't know whether they are right or wrong. I do not know if they are right or wrong. All I can say is I thought Mr. Kim explained himself quite well in his testimony.

You know, let's be honest about it. There are axes to grind on both sides, sometimes, in these areas of the law.

Mr. CLEGG. Absolutely.

Senator HATCH. Political axes to grind, and especially in the media, which does not necessary make the media right and the Civil Rights Division wrong.

Mr. CLEGG. Well, and the picture that is being painted of these white-lab-coat, professional career lawyers who have no political axe to grind at all, on the one hand, and the political appointees being these crazed political operatives who are nothing but political hacks and who care about nothing but winning elections, on the other hand, is ridiculous.

Senator HATCH. I think it is, too.

Mr. CLEGG. The career people have their political agendas. They are often as extreme ideologically, more extreme ideologically, than the political people. And the political people, in my experience, in the main are better lawyers—maybe just because they tend to be more senior, but they are better lawyers—than the career lawyers are.

Senator HATCH. Well, you served in the Justice Department, including the Civil Rights Division, under both President Reagan and Bush I.

Mr. CLEGG. That is correct.

Senator HATCH. I served here on the Judiciary Committee during that entire time, and I remember that some of the same accusations and charges were made against the Civil Rights Division at those times that we are hearing today.

Now, in your testimony, you just got through drawing a useful distinction between political appointees and career staff at the Justice Department. Now, listening to the critics, many people might assume that if there is a dispute or disagreement between them, that is between the career people and the political appointees, the career staff, they are always supposed to win.

Mr. CLEGG. Right.

Senator HATCH. Now, of course, that is not the case at all, is it? In his testimony here today, Mr. Henderson says that while changes in priorities within the Civil Rights Division come with changes in the administration, today these changes are literally challenging what he calls the "core functions of the Division." Do you agree with that?

Mr. CLEGG. No, I don't.

Senator HATCH. Or disagree with it.

Mr. CLEGG. I disagree with that. I think that these are legitimate differences in legal philosophy and in enforcement philosophy. And, again, I don't think that can assume that just because there is a dispute, that therefore it is the career people—or, excuse me, that it is the *political* people who are acting in an unprofessional way. Senator Kennedy, you know, professed to be astounded that there coincidentally was this front-page story in the Washington Post today on the very same day as these hearings were going to be. I don't think that was a coincidence. I think that it is very unprofessional for career people to leak information to the media for their own ends. But I think that that happens, and I think that it happened when I was in the Division, and it is happening now as well.

Senator HATCH. Well, I would also like a response to Mr. Henderson's claim that the Civil Rights Division's record on every score, that is, in every way, on every issue, in every area, is undermining effective enforcement of our Nation's civil rights laws. Do you agree with that? That is a dramatic charge. Do you agree or disagree with that?

Mr. CLEGG. No, I don't. I—

Senator HATCH. You don't agree or you disagree?

Mr. CLEGG. I do not agree with the charge that the civil rights laws are being dramatically undermined by this administration.

Senator HATCH. OK. Well, you know, one of the things that I am concerned about is—I mentioned in my questions—and I asked him specifically because I wanted to see just what Mr. Kim would say about all these new areas of the law that we have enacted up here that are in addition to what they were back when you were there, Professor Landsberg, or at least statutorily different, because they weren't enacted then.

Mr. CLEGG. There are also demographic changes that take place, Senator Hatch. For instance, the fact that there are so many more immigrants now, so many more people who do not speak English well, means that more time has to be spent enforcing Section 203 of the Voting Rights Act.

Now, personally I don't like Section 203 of the Voting Rights Act. I think it is unconstitutional. I think it is bad policy. But you all have passed it, in your wisdom, and the Justice Department has to enforce it. And if the Division—

Senator HATCH. You enforced it when you were there?

Mr. CLEGG. We did. And when the Division because of these demographic changes is required to spend more, to devote more of its resources to enforcing those kinds of laws, it necessarily means that it is going to have fewer resources to devote to enforcing other kinds of laws.

Senator HATCH. Do you mind if I ask one more?
Senator CARDIN. Please continue.
Senator HATCH. I will be glad to yield back.
Senator CARDIN. Go ahead.
Senator HATCH. OK. I really appreciate the way Senator Cardin has allowed me to ask whatever I want to ask, and, of course, I would do the same for him if I were in his shoes. You have really been very decent and fair, as I think you always are.
Mr. CLEGG. If I could just make one other point.
Senator CARDIN. Please don't let the Chairman know that.
Senator HATCH. He said, "Don't let the Chairman know that."
[Laughter.]
Senator HATCH. No, no. I expect Senator Leahy to be fair, too, yes.
Mr. CLEGG. Mr. Henderson gave as an example of how this administration has turned its back on its historic role as enforcing the civil rights laws the briefs it filed in the Seattle and Louisville cases, which are currently pending before the Supreme Court. And Mr. Henderson said that in those cases the Division or the administration opposed voluntary desegregation efforts. I think that that is a very unfair way and misleading way to characterize the briefs that were filed by the administration in those cases.
What the school boards in those cases were doing was assigning children to schools on the basis of race. I thought that it was the principle of *Brown* that you couldn't do that. I thought that *Brown* made clear that you were not supposed to assign school children to schools on the basis of race.
Now, you can call what Seattle and Louisville were doing "voluntary," and I suppose it was voluntary in a sense that no court was forcing the school districts to do so. But, of course, if that is the way you are using the term "voluntary," the segregation under Jim Crow was voluntary, too. The school children were not asking, were not volunteering, to be discriminated against in the Jim Crow era, and they weren't volunteering to be discriminated against in Seattle or Louisville either.
These were not cases about desegregation. These were cases about racial balancing, politically correct racial balancing, and telling children that they could go to this school and they couldn't go to that school because of their skin color.
Now, reasonable people can differ about whether that is a good policy or a bad policy. I think it is pretty clearly a bad policy. But to say that it is somehow beyond the pale for the administration to file a brief saying that that kind of discrimination is wrong is, I think, at best a gross exaggeration.
Senator HATCH. Well, thank you.
Mr. Driscoll, in your testimony you commented on the issue I raised earlier at Assistant Attorney General Kim, that is, the priority in the present Civil Rights Division to fight religious discrimination. Now, you served in the Civil Rights Division as this was developing, and I would like you to comment on its importance and how it fits into the overall mission of the Civil Rights Division. And do you agree with the New York Times last week that protecting Americans from religious discrimination is a distraction from what the Civil Rights Division is supposed to be doing?

Mr. DRISCOLL. Thank you for the question. I love to talk about the Department's initiatives in this regard when I was there because it is something I was proud to be associated with. And I think protecting religious liberties fits in very well with the historic role of the Division, and I think it is at a different point on the curve, so to speak, than some of the other types of discrimination the Division combats. What I mean by that is when the Division started attacking racial discrimination 50 years ago, racial discrimination was very overt, you know, by law in many jurisdictions, and people made decisions not to hire African-Americans or not to let children go to school together explicitly on that basis. And over time, discrimination became more subtle and it becomes harder to smoke out, and you end up in the very complicated place we are today where most race discrimination cases brought by the Department, or the major ones that are talked about today, are about whether or not a test has a particular disparate impact on a group or that cognitive testing is fair to not fair to a particular group.

The religion cases are back where the race cases were in 1957. You have many jurisdictions that say anyone can rent this hall after school is out, anyone can rent the school hall, except if you are religious. And that is what the rule says on its face. No one is hiding anything. No one says there really is no other reason we are doing this. They will tell you straight to your face: No, you can't use this hall. You want to hold a Christian service in here.

And to me, that is exciting. To prosecute those cases, I felt like some of the long-time members of the Division must have felt in the 1960s and 1970s on some of the race cases, that you had, you know, people explicitly saying, no, you can't wear that particular type of headgear to your job because we don't like it and we think it is inconsistent with how we want you to look. And to be able to confront discrimination that is that egregious was, in my mind, something to be proud of and to watch Eric Treene, who has been hired by the Department into a career position, manage that operation has made me extremely proud.

I had the privilege of getting to argue one of those cases in Louisiana, and it was simply stunning to see the position of the school board in question.

So to me, I think the religious discrimination efforts of the Department are to be commended. I think that Congress saw a need, acted unanimously, if I recall correctly, on RLUIPA to correct it. And so I think that the zoning cases the Department has brought are fantastic and needed. There were many places in the country where a non-majority religion would try to build a temple or a house of worship, and the locals would use the zoning ordinances to say, Oh, boy, that temple is going to be too high, that steeple might be too high. It is not really that there are Mormons moving to town that scares us. It is that we do not want 36-foot church steeples. And now with that statute the Department has the ability to remedy that injustice.

And so to me it is exciting, it is needed, and it is something the Department is justly proud of, and I was proud to be a part of.

And if I could address, Senator Hatch, one of your questions to Mr. Clegg, I think another reason cases fluctuate between adminis-

trations—a legitimate reason they can—has to do with the standards different administrations apply in bringing a case. One of the things Assistant Attorney General Boyd and I did before we came to the Department in 2001 was we read transcripts of oversight hearings from this Committee and the House Judiciary Committee and the Civil Rights Division conduct during the Clinton administration. And I felt bad for my predecessors in that they got raked over the coals pretty good by some of you for cases in which it was alleged the Department filed cases without sufficient basis or tried to get a remedy from a jurisdiction without a sufficient factual basis or legal basis. And so we had a pretty high standard to say, if we are going to go to court, we are going to win; and if we are going to settle a case, we are not going to settle it for what we wouldn't have won in court. And there had been a history, when we arrived at the Division, of, I think, $4 to $5 million in sanctions, litigation sanctions against the Division for positions taken in court for overreaching. And so while it is great to be aggressive and everyone wants to aggressively enforce the Nation's civil rights laws, if being aggressive means paying out $2 million to your opponent because you filed a case without legal merit, then maybe being aggressive isn't a good thing.

And so we tried very hard to make sure that if we filed a case, we were going to win; and that if we settled the case, we recovered only what we could have gotten if we had won in court.

Senator HATCH. Well, I appreciate your comments.

Mr. Chairman, you know, under the Clinton administration, the Division was sanctioned over 1.7 million bucks for overreaching on an employment case. Now, you know, I wonder if that case would be reported favorably or unfavorably.

Let me just finish with this, because it is a matter of great concern to me. I was in law school when John F. Kennedy ran for President, and I saw the prejudice—and at the University of Pittsburgh. Pittsburgh was 60 percent Catholic. And I saw—

Senator CARDIN. That is my alma mater, also.

Senator HATCH. Pardon?

Senator CARDIN. University of Pittsburgh is where I went to school.

Senator HATCH. Sure, and we are both—

Senator CARDIN. I am not Catholic, though.

[Laughter.]

Senator HATCH. We are both great people, I have to say.

Senator HATCH. You are catholic if you use the broad meaning of the term.

But let me just say this: that there was a lot of prejudice at that time, and I think we broke through that. Then I look at—now, I do not mean to dwell on it except that it comes personally home to me as well. I don't like discrimination. You know that, Wade, Mr. Henderson. I have done an awful lot to try and support you over the years, and I am going to continue to do so. I was the prime sponsor of the Civil Rights for Institutionalized Persons. I am one of the prime sponsors of the Emmett Till case, and you can go right on down the line. We have not always agreed, but I think we both come from a tradition of wanting to do what is right in these areas.

But I look at Mitt Romney running now, and all of these papers that are criticizing this administration are running scurrilous comments about his personal religious beliefs, even though all of them admit he lives a very morally upright life, has a wonderful family, has been an exceptionally great business person, made the Winter Olympics the greatest Winter Olympics in the history of the business, and yet you cannot read an article without some coming close to libel about his personal religious beliefs. And I think most people who know of his religious beliefs will have to admit they are pretty good people, the vast majority of them who live their religion, just like others are good people, just like our Catholic friends, our Baptist—you name them. And yet we have that going on in our society, and it is pure and total bigotry.

So I could empathize with any one of you who feels deeply about these issues, and I want to help you. On the other hand, there are differences in statistics. There are differences in cases. There are differences in administrations. But the major staff stays there regardless, and they are not pushovers. And I have lived through those, and I have to say thank goodness they are not. But the point is that nobody can walk into the Civil Rights Division and just make it whatever they want it to be. You can have different points of view. You can have different approaches, legitimately, which I think they are in this case.

I haven't given you a very good chance to respond to some of these things, and I will certainly do that. But I just want you to know that we take this seriously, but I get a little tired of the really rotten media coverage in some of these areas. It is good to point out defects. It is good to point out things that aren't quite right. But to slant them all in one way it just seems to me is just plain wrong. Unfortunately, I find that in a lot of these instances they have slanted them in the wrong way because they believe one way and others believe the other.

Now, I only cite the Mormon instance because I have just seen it in everything ever since Mitt Romney—and I ran for President in 1999 for a short period. I wanted to get across some ideas, didn't really think I had much of a chance, and that proved to be true. But I was sick and tired of some of the prejudices that were out there, and I was going to do what I can about it and have ever since.

But all I can say is that each of you I honor because you have taken time to come and be with us. Each of you has your respective points of view, but let's understand that I just do not believe that these political appointees are bad people, and I just do not believe that they can overwhelm the thousands of workers at the Justice Department who may or may not agree with them.

Yes, Wade, if you would like to—

Senator CARDIN. I am going to allow Mr. Henderson a brief reply now. Senator Hatch has very deep views on this, and we have been very understanding on the time. We are now up to about 26 or 27 minutes on the 5-minute round, and that is quite all right because I think you have made an important point, and I think in this hearing we can afford the latitude of a little bit of discretion considering the time that we had available.

So I will let Mr. Henderson respond, and then the Chair will have some questions.

Mr. HENDERSON. Thank you, Mr. Chairman. I appreciate it. And, Senator Hatch, thank you for the courtesy of providing a response.

Let me say at the outset that I think we are in complete agreement about the treatment of Governor Romney and the question of his religion in the public debate about his qualifications for the Presidency. I think we should set that aside. I think that should not be the subject of conjecture in the way that you have characterized it here, and we would agree.

In addition to my work at the Leadership Conference, Senator, I serve as the Joseph Rauh Professor of Public Interest Law at the University of the District of Columbia. I mention it because I know that you knew Joseph Rauh, who was an extraordinary lawyer and advocate on behalf of civil and human rights, the long-time pro bono counsel to the Leadership Conference on Civil Rights.

I also know that your personal record as well as that of Chairman Cardin is beyond question with regard to your commitment to civil and human rights.

Senator HATCH. Thank you.

Mr. HENDERSON. And I think the record that you both bring to the table makes a larger point, which is to say that the protection of civil rights is not a partisan issue, it is a national issue.

Now, I am reminded that on this, the 50th anniversary of the Little Rock nine school case, the effort to integrate the high schools in Little Rock, the response of President Eisenhower and the response of Congress in passing the Civil Rights Act of 1957, which, of course, established the Civil Rights Division, was born out of a recognition that more was needed to protect the constitutional rights of all Americans. The history of the Civil Rights Division under Republican leadership and under Democratic leadership in pursuing a goal of integrating schools in the Old South made a tremendous impact in helping to transform America and having it become the "more perfect union" it is today. It is, of course, not perfect but it is a more perfect union than it was 50 years ago.

Senator HATCH. I agree.

Mr. HENDERSON. The truth is it gave me great distress to see the Justice Department move from the courageous positions it took under Eisenhower's Attorney General, Herbert Brownell, in helping to integrate schools into an amicus brief filed in the Louisville and Seattle desegregation cases that sought to limit what may well be the only last best effort to ensure integrated public education on a voluntary basis in school systems struggling to overcome the difficulty and inequality that is inherent in America's education system.

We know that the struggle for civil and human rights has not at the end of the day been entirely as successful as many of us, yourself included, would have liked. The truth is our school systems today are as unequal, providing as limited an opportunity in many respects as they did many years ago, and it is only because of Federal efforts of the kind that we are talking about here, plus the involvement of local parents and, obviously, school boards in trying to change the system which we have today.

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I do not take a back seat to anyone in respect for the protection of civil rights, and I certainly recognize that the Department does have statutory responsibilities that have been broadened over the past 50 years. But to suggest that changes in administration result in the kinds of fall-off in the enforcement of existing civil rights laws that make such a difference in the lives of ordinary Americans is, in my judgment, to damn the political process beyond what it deserves. What we are looking at here is a manipulation of discretion and statutory responsibility in a way that represents a substantial step back from what most Americans believe is the responsibility of our Government to all of its citizens. And to those who are on the wrong side, if you will, of the rights question—that is to say, to those who are struggling to make the meaning of American citizenship reach, you know, the fulfillment of what the Constitution promises to all, to not have the Justice Department on our side as we struggle for these issues, in my judgment, is inconsistent with the efforts of the great men and women, both Republican and Democrat, who helped to bring this Division into existence.

So I think it is certainly a perfect opportunity on this, the 50th anniversary of the Division and its foundation, that Congress examine the core questions of whether the Division is living up to the charge that Congress gave it when it was created 50 years ago. And I think the testimony that we have submitted today is fully consistent with the view of sponsors of the Civil Rights Division that went beyond the kind of political considerations which we are talking about this afternoon.

Senator CARDIN. I thank the panel for their patience. There are a couple questions that I do want to ask, though, to try to make sure the record is complete.

Mr. Clegg, I found very disappointing your explanation of the Washington Post article, sort of glossing over the content, and maybe suggesting that it is the political appointees who protect the nonpartisan operations of the Department of Justice and it is the career attorneys that you have to watch out are the partisan activists. I think that is an affront to the employees at the Department of Justice, the career employees who have, I think, withstood an awful lot in carrying out their work. So let me turn to one of those career employees in the Department of Justice, Professor Landsberg, if I might. He is not wearing a white jacket, but I do believe he raised—you raised a point that to me applies to both career line attorneys at the Department of Justice Civil Rights Division as well as the political appointees, and that is, they have to say no to political pressure.

We are holding a series of hearings in the Judiciary Committee on the problems of the hiring and firing of U.S. Attorneys and the political influence that has been used in the firing of U.S. Attorneys. I must tell you, I am concerned as to whether similar practices are taking place within the Civil Rights Division as far as trying to hire individuals that have certain leanings rather than looking for career people.

So I just really want to get your take on the importance of not just the career attorneys, but the political appointees standing up

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to political pressure in order to carry out what is important tradition of the Civil Rights Division.

Mr. LANDSBERG. I think the public expects and deserves fair enforcement of the law. If the public believes that enforcement of the law is dictated by political pressures, they are not going to have confidence in the law; they are not going to have confidence in the Department of Justice. A lawyer depends upon his or her reputation, his credibility, and I think that whenever the Department engages in the kinds of activities that you have described, that then the credibility of the Department suffers.

We have seen examples of that over time, and I think a lot of these examples are due to the failure of the two groups to talk to one another on some occasions. A very good example was at the beginning of the Reagan administration, the filing of a brief in the Bob Jones case, which was basically saying that it was all right for tax-exempt educational institutions to discriminate based on race. I think if the political appointees had listened, engaged in dialog with the career people, they could have avoided a very bad mistake.

I think, on the other hand, that in my career I have seen a number of instances of great courage being demonstrated. I mentioned a couple of those in my written testimony. At the beginning of the Reagan administration also, I was in Solicitor General Lee's office when we were arguing about the position in a case, and the Education Department wanted to reverse the position of the prior administration in a case. And they weren't getting anywhere with the Solicitor General. Finally, one of the Education Department lawyers said, "But we won the election." And Solicitor General said, "Well, that has nothing to do with what position we ought to take in this case. The question is the law." And I think that that is what we want to see from our law enforcement officials.

Senator CARDIN. The reports in the Washington Post would tell us to the contrary. The action taken against Angela Miller and Sarah Harrington and other—allegedly. I mean, we will wait to see what the facts show, but what these reports are indicating is that there were political considerations on taking cases away from them, encouraging them to basically leave because they voted for the wrong person in the last election.

That is certainly troublesome to me, and we started the hearing a little over 3 hours ago, and Mr. Kim has denied any of this, and I feel a little bit better knowing he is going to take some action to make it clear to his Department that that will not be tolerated. I will wait to see the exact language of what he issues. But I must tell you, these articles just do not come out of thin air.

Mr. LANDSBERG. Mr. Chairman, I have to tell you that in my 20-some-odd years at the Division, I made lots of recommendations to lots of Assistant Attorneys General that they rejected. I wasn't happy they rejected them. But never did I lose a job because I disagreed with an Assistant Attorney General. I had many very vehement discussions with Assistant Attorney General William Bradford Reynolds, who was the last one I worked for. We disagreed quite a bit. Never was there a suggestion that I would lose my job, that I would be removed as the head of the Appellate Section because I disagreed with him.

So I think that there is a difference. I think that it is a healthy thing. I agree the political appointee should not just rubber stamp what the career people have to say. Obviously they have their own responsibility. But they do have a—there is a process that I think is essential to follow, and the process includes respectful consideration of what the career people have to say. If you disagree with what they have to say, then let's have a discussion of it. Let's hash it out. Let's see if we can reach some agreement. If we can't reach some agreement at the end of the day, obviously the boss has the final word. But the final word is not, "I am going to fire you because I disagreed with you."

Senator CARDIN. I think that is what troubles a lot of us about what is happening in this administration. We understand that the administration has the right to have its priorities pursued, and we understand there are different priorities, even within the Office of Civil Rights, and that is the prerogative of the administration. It is also the prerogative of the administration to make the final judgments. But the political interference here appears to have gone beyond what has been the historical record of the Civil Rights Division, but also what is permitted by law.

Mr. Clegg, I just want to make sure I get on the record, and Mr. Driscoll, whether you believe that the two provisions that are—one a regulation of the Department of Justice making it wrong to discriminate on political affiliation, and the other civil rights rules that it would be a prohibited practice to discriminate based upon political affiliation. Do you agree with those provisions that are in regulation and law?

Mr. CLEGG. Yes, I do, and, of course, it is sort of beside the point whether I agree with them are not. They are the law, and they have to be followed.

Senator CARDIN. Well, I know, but we could change them. We have the ability to change the civil service laws. It is in the United States Code. We could change it.

Mr. CLEGG. I think that that is fine. You know, my only caveat, as I said in my written testimony, is that I think it is appropriate in deciding who gets hired to try to hire the person who is the best person for the job. And that can include the fact that that person shares a commitment to the enforcement agenda that the administration has. The example that I gave—

Senator CARDIN. So would it be appropriate to suggest that the appointments come from the political party's attorney list that have been involved in election laws for that political party?

Mr. CLEGG. No. I think that—

Senator CARDIN. Well, perhaps if your priority in your administration is to make sure that the election laws are fairly applied, wouldn't you go to your political party then and get their best lawyers?

Mr. CLEGG. No, because I don't think that that is a very good proxy for getting enough lawyers.

Senator CARDIN. But I am not sure I understand how you get the right people.

Mr. CLEGG. Well, let me give you an example. You know, suppose that Bobby Kennedy, when he was the Attorney General, was hir-

ing people to work in the Civil Rights Division, and he had two applicants, both of whom had great credentials, and—

Senator CARDIN. We are talking about for a career position, not a political appointment.

Mr. CLEGG. A career position.

Senator CARDIN. And the Attorney General is doing the interviewing himself.

Mr. CLEGG. Right. Or, you know, make it Burke Marshall, if you want.

Senator CARDIN. Well, no, I raise that because prior to Attorney General Ashcroft, these appointments were vetted through career individuals, these appointments. It is only under Attorney General Ashcroft and this administration that that was taken over by political appointees.

Mr. CLEGG. Now, I read that, too, but I have to tell you, Senator, that when I was a political deputy in the Civil Rights Division, I was involved in deciding who got hired as a line attorney—

Senator CARDIN. You did the interviewing process and you were the principal person?

Mr. CLEGG. Sometimes—no, I wasn't the principal person, but I was—

Senator CARDIN. Who was the principal person?

Mr. CLEGG. Well, I think the final decision was the head of the Division.

Senator CARDIN. But who vetted—who went through the applications? Who was the one who did the preliminary work?

Mr. CLEGG. I don't even remember. I think it was probably the section chief. But my point is—let me finish my example, if I could. If Kennedy was trying to decide which of two applicants to hire and both applicants had superb qualifications, but one of them had a real visceral commitment, a passionate commitment to dismantling Jim Crow, and, really had the fire in the belly to get down there and enforce the laws and thought that *Brown* v. *Board of Education* was rightly decided and that the civil rights laws needed to be enforced, and the other one didn't and thought that Brown was wrongly decided and was really lukewarm, I think it would be perfectly appropriate for the administration to say, well, this guy, the first guy, is better for the job.

Senator CARDIN. We are not going to see eye to eye on this because I want the process within the Department of Justice to look at the qualifications of the individuals, not just what they say and what they are committed to, but take a look at their record. I want experienced individuals that know what the civil rights laws are about, know how to enforce those civil rights laws, have experience and are going to be competitive against the forces they have to come against.

Mr. CLEGG. I do, too.

Senator CARDIN. That is who I want there.

Mr. CLEGG. I do, too.

Senator CARDIN. So I am not interested in interviewing people and giving them a litmus test on a particular issue. I want to get the best career people. And what worries me is that I think your thoughts are what is currently being used by the Department of Justice, that is, to look beyond the qualifications of the attorneys

that apply for these positions, but to start looking at certain litmus tests that are very much related to party affiliation. And that should have no place in the Civil Rights Division, should have no place in hiring attorneys that are career attorneys.

We are not going to agree on the process for hiring attorneys, but I did want to get your view on the current law, and I did not get Mr. Driscoll's. Just for the record—you can answer yes or no—do you support the current prohibitions against discrimination based upon party affiliation?

Mr. DRISCOLL. I do. I think they are appropriate.

Senator CARDIN. Thank you. I would just like to get your reaction to the reports in the Washington Post today. Is that just business as usual? Or do you see that as just partisan snips by the individuals involved? Or do you think it is serious issues?

Mr. CLEGG. I think it is a newspaper article. I don't know how much of it is true.

Senator CARDIN. I take it when you were—

Mr. CLEGG. I think there are some parts of it—if some parts of it are true, they are disturbing.

Senator CARDIN. I have had many positions I have held in public life, including responsible positions on the Ethics Committee having to investigate actions. And I must tell you, I treat articles in the paper with the respect they should receive; that is—no, because it affects public opinion, it affects what the public out there is seeing. And if there is something out there that is wrong, I want to correct it.

So what is in this paper concerns me greatly, and if it is false, let us get the facts out to show it. But to say it is just an article, I think that is what Mr. Putin says: These are just articles, so, therefore, we will control the press.

Mr. CLEGG. My point is—

Senator CARDIN. Mr. Driscoll, how do you feel about the articles that are in the paper? How about this? I am going to give you a chance for record.

Mr. CLEGG. I didn't say it was "just an article." I said "it is a newspaper article."

Mr. DRISCOLL. I guess I am waiting to see—I know it is under review, it is under investigation. I certainly think that it is an interesting timing that the article came out the day Mr. Kim was going to testify concerning events that happened multiple years ago. But I think it raises serious allegations that deserve to be investigated. But I know the Department has strong protections and it is an employee personnel matter that the Department can handle.

Senator CARDIN. The Department can handle. OK. Thank you for your responses.

Professor Norton, I want to give you a chance. Mr. Clegg has several times referred to your testimony as far as the numbers. During his direct testimony, he compared the circumstances in the 1960s to today and said that clearly the challenges are different today than they were in the 1960s.

Now, your testimony, I thought, dealt with the comparison between the Clinton administration and the Bush II administration. And I haven't noticed a dramatic change in the landscape in the

last—well, maybe I have noticed a change in the landscape, but it is not necessarily all positive in the last 6½ years. So I want to give you a chance to talk a little bit more about the type of cases, the number of cases, the quality of cases that you referred to in your direct testimony that has been now referred to several times, I think by both Mr. Driscoll and Mr. Clegg.

Ms. NORTON. Thank you, Mr. Chairman. There are at least two points on which I agree with Mr. Clegg, but perhaps very little else.

First, I agree that we should not expect the numbers to remain in complete and perfect lockstep from administration to administration, but what we are seeing between the previous administration and this one is not a minor change in numbers, but a dramatic change. We are talking about basically half of the Title VII enforcement activity that we saw during the Clinton years. That is not a minor variation. That is a dramatic change.

Second, I also agree with him that race discrimination is not the problem in 2007 that it was in 1967. However, I find it hard to believe that race discrimination is only half the problem in 2007 than it was in 1997. And, again, that is what the enforcement numbers would lead one to believe because we are seeing half the enforcement activity with respect to Title VII than we saw during the previous administration.

Folks talk about the fact that priorities change from administration to administration. That is true. It is true that the Civil Rights Division has many important and competing responsibilities. However, given the genesis of both Title VII and the Civil Rights Division itself in the civil rights movement on behalf of African-Americans, I find it hard to believe that fighting job discrimination against African-Americans and Latinos could ever fail to be a priority.

But even if you disagree with me about that and you think that there should be other priorities or there are other types of discrimination that should command more attention today, let me know that the enforcement activity has dropped across the board so that workers of all protected classes are suffering. There are two exceptions. The two areas in which the Employment Litigation Section enforcement activity has increased are these: No. 1, there has been a rise in the number of pattern and practice cases alleging religious discrimination; and, No. 2, there has been a rise in the number of pattern and practice cases alleging discrimination against white men.

Every other measure has declined, and declined steeply. If all we were talking about were those two changes, if those were the only two changes and everything else had remained the same, I wouldn't be here today, or at least I would have very little to say. But the problem is that everything else, every other measure has dropped—measures for African-Americans, for Latinos, for women, for victims of retaliation, and for individual victims of religious discrimination. I will note that those numbers have dropped substantially. During the Clinton administration, at least 11 claims were brought on behalf of individual victims of religious discrimination. We have seen only two during the current administration.

Senator CARDIN. So it is numbers. Are there examples of opportunities that the Department of Justice Civil Rights Division has not been aggressive that could have made a major difference? We know of a couple cases that you mentioned where they did get involved, and I appreciate your clarification of the record on those two cases that I referred to with Mr. Kim. But the numbers tell us one thing. Are there stories that we know where we would have hoped that the Department would have been more conscientious and they did not move forward?

Ms. NORTON. Well, I guess I could offer a couple of things for your consideration. Each year the EEOC refers several hundred cases to the Department of Justice for possible litigation. These are cases in which individual employees of State and local governments have charged discrimination, that the EEOC has investigated those claims and concluded that there is reasonable cause to believe that discrimination has occurred, and has referred the matter to the Department of Justice for possible litigation. Several hundred a year. They vary from 200 to 500 a year. Yet over the last 6½ years—so that is thousands of cases; I would say over 3,000 cases over those year, 3,000 referrals—we have seen 28 individual claims brought. It seems to me there is a whole pool of possible cases that are not being tapped into right now.

Senator CARDIN. And I believe I am correct that the number of attorneys has actually increased, so they actually have more attorneys to—

Ms. NORTON. Yes, approximately 20 percent more attorneys have been assigned to the Employment Litigation Section during the Bush administration compared to the previous administration, which is very troubling. Basically what we are seeing is the current administration doing considerably less despite considerably greater resources.

Senator CARDIN. Well, let me thank the panel for their patience. I know it has been a long hearing. These are issues that are important for our Committee to review.

The hearing record will remain open for 1 week for additional written submissions. The Committee will stand in recess. Thank you all very much.

[Whereupon, at 5:06 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follows.]

QUESTIONS AND ANSWERS

Questions from Senator Dianne Feinstein
to Robert N. Driscoll
following the June 21, 2007 Hearing of the Senate Judiciary Committee

1. You argued in your testimony that there is nothing inherently wrong with the fact that the Assistant Attorney General or his or her staff may disagree with the career staff in the Division. You point out the concerns that would arise if the front office took a rubber-stamp approach to the recommendations of career staff in all cases.

- What indicators can this Committee use to find out whether a front office decision to overrule career staff is the result of politicized decision making rather than good-faith disagreement about the law?

It is always difficult to judge the "intent" behind any particular decision, but it seems to me that a "front office" that was not basing its decision on a good faith interpretation of the law would end up losing a higher number of cases and/or being criticized by Courts for taking positions that were not legally supportable. Thus, one measure of whether decision-making was not grounded in law would be whether Courts have sanctioned the Department for taking legally unsupportable decisions. For example, prior to my tenure at the Department, the Civil Right's Division was sanctioned, and forced to pay substantial fines on several occasions, by Courts that found that the Department had taken positions that were not supported by the law. Of course, there is no way to know whether political factors played a role in the Division's decisions to take such positions, but a finding by a Court that a position taken was so frivolous as to be sanctionable would indicate that good faith application of the law may not have been the motivating factor.

Conversely, a Court's later affirmance of a position taken by the Civil Rights Division (even if the career staff disagreed with the decision) would tend to indicate that the decision was grounded in reasonable legal interpretation. For example, Section 5 "preclearance" decisions of the Civil Rights Division are often reviewed by the Courts. While not every reversal would indicate "political" decision-making, a trend of Court decisions rejecting the legal analysis of the Division might raise concerns that should be inquired about, while a trend of affirmance might allay concerns that certain decisions were not well-grounded in the law.

2. You state in your written testimony that when you served as Justice Department official, the Department entered into memoranda of understanding or reached other resolutions in certain cases, which made it unnecessary to file lawsuits. On this basis, you argue that a "cases filed" analysis is not a good measure of the Division's enforcement record.

- Do you have any reason to believe that these less formal resolutions, such as memoranda of understanding, are being reached more frequently during the current administration than during past administrations? If yes, please provide all of the evidence on which you base your belief.

My understanding, based on discussions with career staff during my time with the Department (2001-2003), was that less formal resolutions and out-of-court settlements were more frequent during the time of my service. I cannot comment on whether this perceived trend continued after 2003. For some statutes, such as CRIPA (the Civil Rights of Institutionalized Persons Act), the Division files annual reports to Congress listing each lawsuit and out of Court settlements. Also, many of the sections in the Division list out-of-court settlements and resolutions on their websites -- see, e.g. the Special Litigation website at http://www.usdoj.gov/crt/split/findsettle.htm#congrep. A review of the Special Litigation website shows numerous out-of-court settlements of police misconduct, prison and juvenile facility cases. The concern expressed in my previous written testimony is that using a metric of "cases filed" would not cover any of these types of resolutions, many of which reflect substantial good work by the Division.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 21, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Assistant Attorney General Wan Kim, before the Committee on June 21, 2007, concerning oversight of the Justice Department's Civil Rights Division. We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Hearing Before the
Committee on the Judiciary
United States Senate
Concerning
"Civil Rights Division Oversight"
June 21, 2007

Questions Submitted to
Assistant Attorney General Wan Kim

Questions Posed by Chairman Leahy:

1. **You testified that the Civil Rights Division has "been vigilant in enforcing the cases where we find them," and that "I will bring cases where I find the facts and the law to be appropriate." Yet, under this administration, the Civil Rights Division brought fewer cases overall and failed to bring many if any enforcement actions in several categories. Wade Henderson, President of the Leadership Conference on Civil Rights, testified that "in the area of employment, since January 20, 2001, the Bush Administration has filed just 35 Title VII cases, or an average of approximately six cases per year." He also testified that "the Voting Section did not file any cases on behalf of African-American voters during a five-year period between 2001 and 2006 and no cases have been brought on behalf of Native American voters for the entire administration. In addition, during the same five-year period, the Department only filed one case alleging minority vote dilution in violation of Section 2 of the Act." Under President Bush, the Department has brought only a handful of cases alleging discrimination in voting on behalf of Hispanic Americans.**

   Aside from merely waiting for cases to emerge, what resources are you devoting to actually investigating civil rights violations and allegations? How many staff attorneys and analysts are tasked with developing cases to be brought or joined by the Division? How high a priority is investigating, as compared with litigating, such cases for the Division?

Answer: During this Administration, the Civil Rights Division has been exceptionally active in enforcing all provisions of the Voting Rights Act ("the Act") and has set a number of records in enforcement.

As stated in the attached letter from Principal Deputy Assistant Attorney General Richard Hertling to Chairman Leahy dated July 3, 2007, during this Administration, the Voting Section of the Civil Rights Division has filed four cases and successfully litigated a fifth, in addition to interposing thirty-six Section 5 objections, on behalf of African-American

voters in various jurisdictions. The cases filed include *United States v. Crockett County* (W.D. Tenn.); *United States v. Euclid* (N.D. Ohio); *United States v. Miami-Dade County* (S.D. Fla.); and *United States v. North Harris Montgomery Community College District* (S.D. Tex.), which also involved protecting the rights of Hispanic citizens. In addition, we successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.) and successfully defended that victory through appeal to the U.S. Supreme Court.

During this Administration we also have brought a majority of all of the Division's cases on behalf of Hispanic voters in the entire history of the Act. Similarly, the Division has obtained improved and extended consent agreements to better protect Native American voters in many jurisdictions, including Bernalillo, Cibola, Sandoval, and Socorro Counties, New Mexico. The Division also filed a new lawsuit under the National Voter Registration Act to protect Laguna Pueblo and other Native American voters in Cibola County; and we have obtained a Choctaw language program for Mississippi, where nine counties are covered under Section 203.

During this Administration, the Division has brought two thirds of all cases *in history* under the minority language provisions of the Voting Rights Act, with a total of 26 of the 39 cases ever filed by the Division. These have included the first cases ever filed by the Section on behalf of Filipino, Korean, and Vietnamese Americans, and the first two cases ever filed by the Section under Section 4(e) of the Voting Rights Act. The Division also has filed over 75 percent of all cases ever filed under Section 208 of the Voting Rights Act, an important protection against voter suppression through its guarantee that voters may receive assistance in casting their ballots from the person of their choice other than their employer or union officer. The Civil Rights Division has filed seven lawsuits under Section 208 in this Administration, including the first case under the Act on behalf of Haitian Americans. The Division also filed the first case under Section 5 since 1998.

The Civil Rights Division also has been vigorous in its Section 2 enforcement. In the last year, the Civil Rights Division obtained preliminary injunctions against the use of at-large election systems in two cases. There had been no previous comparable preliminary injunctions since 1986, 21 years before, and only four previous such injunctions in the history of the Act. In all, during this Administration, the Civil Rights Division has filed 11 cases under Section 2 and successfully tried additional cases filed in the previous Administration. The Civil Rights Division has filed these 11 Section 2 cases across the country, in Colorado, Florida, Georgia, Massachusetts, Mississippi, New York, Ohio, Pennsylvania, and Tennessee. In addition to challenging discriminatory at-large election systems, the Division also has filed ground-breaking lawsuits in a vigorous campaign against vote suppression. Such lawsuits include *United States v. Long County, Georgia*, where Latino voters were subjected to spurious race-based challenges, and *United States v. City of Boston, Massachusetts*, where ballots were taken from minority voters and marked contrary to the voters' wishes, as well as the many lawsuits under Section 208 filed by the Division, including those noted previously.

The Civil Rights Division has also breathed new life into other statutes it is responsible for enforcing. The Division has filed the first case in decades under the Civil Rights Act of 1960. During this Administration, the Division has surpassed the number of cases filed in the previous Administration under the Uniformed and Overseas Citizens Absentee Voting Act. The Division has filed a majority of all cases under the National Voter Registration Act, including the first Section 7 "agency" cases since 1996. The Division recently filed an NVRA lawsuit in Cibola County, New Mexico, where hundreds of voter registration applications were not processed in a timely fashion, and where Native American voters were removed from the voter lists without the notice required by the list maintenance provisions of the NVRA.

The Cibola County case also involved a claim under the Help America Vote Act ("HAVA"), as Native American voters were not offered provisional ballots as required under the statute. HAVA is a major statute that has required a commitment of considerable resources by the Division. The Division has filed nine lawsuits under HAVA since it was passed in 2002 and has performed extensive outreach to State and local election offices to encourage voluntary compliance with the Act's complex provisions.

In all, the Civil Rights Division actually has filed substantially more voting cases during this Administration than were filed during the comparable period of the previous Administration.

The Civil Rights Division also remains diligent in combating employment discrimination, one of the Division's most long-standing obligations. Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those claims are investigated and potentially litigated by the Equal Employment Opportunity Commission ("EEOC"). However, the Civil Rights Division's Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers.

Pursuant to Section 707 of Title VII, the Attorney General has authority to bring suit against a State or local government employer where there is reason to believe that a "pattern or practice" of discrimination exists. These cases are factually and legally complex, as well as time-consuming and resource-intensive. During this Administration the Department has in fact approved the filing of four "pattern or practice" race discrimination employment lawsuits on behalf of African Americans.

One recent case highlights our efforts. In *United States v. City of New York*, filed on May 21, 2007, the Division alleged that since 1999, the City of New York has engaged in a pattern or practice of discrimination against black and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York ("FDNY") in violation of Title VII. Specifically, the complaint alleges that the City's use of two written examinations as pass/fail screening devices and the City's rank-order

processing of applicants from its firefighter eligibility lists based on applicants' scores on the written examinations (in combination with scores on a physical performance test) have resulted in disparate impact against black and Hispanic applicants and are not job related and consistent with business necessity. The complaint was filed pursuant to Sections 706 and 707 of Title VII, and was expanded to include discrimination against Hispanics as a result of the Division's investigation.

In Fiscal Year 2006, we filed three complaints alleging a pattern or practice of employment discrimination – as many as filed during the last three years of the previous Administration combined. In *United States v. City of Virginia Beach* and *United States v. City of Chesapeake*, the Division alleged that the cities had violated Section 707 by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. In *Virginia Beach*, the parties reached a consent decree providing that the city will use the test as one component of its written examination and not as a separate pass/fail screening mechanism with its own cutoff score. On June 15, 2007, the court provisionally entered a consent decree in the *City of Chesapeake* litigation. Under the decree, the City will create a fund to provide back pay to African-American and Hispanic applicants who were denied employment solely because of the City's use of a math test as a pass/fail screening device. The City also will provide priority job offers for African-American and Hispanic applicants who are currently qualified for the entry-level police officer job but were screened out solely because of their performance on the math test. The City will provide retroactive seniority to such hires when they complete the training academy. In addition, the City agreed that, while it will still use scores on the mathematics test in combination with applicants' scores on other tests, it will not prospectively use the mathematics test as a stand alone pass/fail screening device.

The Division also has enforcement responsibility for the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). USERRA was enacted to protect veterans of the armed services when they seek to resume the job they left to serve their country. USERRA enables those who serve their country to return to their civilian positions with the seniority, status, rate of pay, health benefits, and pension benefits they would have received if they had worked continuously for their employer. In Fiscal Year 2006, the Division filed four USERRA complaints in Federal district court and resolved six cases.

During Fiscal Year 2006, we also filed the first USERRA class action complaint ever filed by the United States. The original class action complaint, which was filed on behalf of the individual plaintiffs we represent, charges that American Airlines ("AA") violated USERRA by denying three pilots and a putative class of other pilots employment benefits during their military service. Specifically, the complaint alleges that AA conducted an audit of the leave taken for military service by AA pilots in 2001 and, based on the results of the audit, reduced the employment benefits of its pilots who had taken military leave, while not reducing the same benefits of its pilots who had taken similar types of non-military leave. Other examples of recent USERRA suits include *Richard White v. S.O.G.*

Specialty Knives, in which a reservist's employer terminated him on the very day that the reservist gave notice of being called to active duty. We resolved this case through a consent decree that resulted in a monetary payment to the reservist. In *McCullough v. City of Independence, Missouri*, the Division filed suit on behalf of Wesley McCullough, whose employer allegedly disciplined him for failing to submit "written" orders to obtain military leave. We entered into a consent decree in which the employer agreed to rescind the discipline and provide Mr. McCullough payment for the time he was suspended. The employer also agreed to amend its policies to allow for verbal notice of military service.

In Fiscal Year 2007 thus far, we have filed 5 USERRA complaints in district court and resolved 5 cases. Additionally, the United States Attorney's offices have resolved three cases this fiscal year. One of these cases we have resolved in the current fiscal year is *McKeage v. Town of Stewartstown, NH.* In that case, the town sent Staff Sergeant Brendon McKeage a letter while he was on active duty in Iraq telling him he no longer had his job with the town. McKeage had been employed as the Chief of Police for the Town of Stewartstown. When the citizens of Stewartstown learned that their Chief of Police had been terminated while serving his country, they voted to censure the Town for its "outrageous and illegal" conduct. Despite this public censure, the Town still refused to reemploy SSG McKeage in his former position. Once we notified Stewartstown that we intended to sue, the employer decided to settle the case. The settlement terms include a payment to SSG McKeage of $25,000 in back wages.

The Division has proactively sought to provide information to members of the military about their rights under USERRA and other laws. For example, we recently launched a website for service members (www.servicemembers.gov) explaining their rights under USERRA, the Uniformed and Overseas Citizen Absentee Voting Act ("UOCAVA"), and the Servicemembers' Civil Relief Act ("SCRA").

Far from "merely waiting for cases to emerge," the Division has extended and systematized enforcement and outreach to record levels. For example, the Division has undertaken what is by far the most vigorous election monitoring program in history. During calendar year 2004, a record 1,463 Federal observers and 533 Department personnel were sent to monitor 163 elections in 106 jurisdictions in 29 States. This compares to the 640 Federal observers and 110 Department personnel deployed during the entire 2000 presidential calendar year. In 2006, another record was set for the mid-term elections with more than 800 Federal observers and Department personnel sent to monitor polling places in 69 jurisdictions in 22 States on Election Day. The Department's election monitoring program also has been very active in non-Federal election years. In calendar year 2005, for example, 640 Federal observers and 191 Department personnel were sent to monitor 47 elections in 36 jurisdictions in 14 States. The current "off-year" monitoring program is more aggressive than the presidential year program of 2000.

The suggestion that Division resources for investigation and litigation are somehow separate is an error. Attorneys investigate potential cases first, and then they litigate

those cases where appropriate. The same personnel are involved, as has always been the case.

2. We have learned from recent reports that Hans von Spakovsky, a political appointee in the Voting Section, overrode career attorneys in approving a Georgia photo identification law. The career attorneys had recommended not approving the law because they that it would discriminate against African-American voters. According to a June 8, 2007 article in the *Washington Post*, "around the same time von Spakovsky wrote an anonymous article in a legal journal arguing that every voter should be required to show a photo ID" in order to vote. A federal court struck down the Georgia photo ID law as unconstitutional and called it a modern day "poll tax."

a. You testified that about the role of the Justice Department that "what we're doing is trying to enforce the laws passed by this Congress as effectively as possible" and that the proper role of the Justice Department is to effectuate the will of Congress. How is your description of the Justice Department's role consistent with the anonymous, pro Voter ID op-ed written by Mr. von Spakovsky while he was simultaneously involved in pre-clearing the same type of law for Georgia? How did his action effectuate the will of Congress?

Answer: Pursuant to applicable regulations, a Department employee such as Mr. von Spakovsky may publish a law review article without formal Departmental clearance so long as the article does not divulge non-public information and the employee is not identified as a Departmental employee. In particular, pursuant to 5 CFR §§ 2635.703 and 2635.807, Department employees "shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another." In addition, "[a]n employee who is engaged in teaching, speaking or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity" with certain exceptions.

In August 2005, the Department precleared a Georgia voter identification law, which itself amended an existing voter identification statute that had been precleared by the prior Administration. This preclearance decision followed a careful analysis that lasted several months and considered all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of State photo identification and driver's license cards and the views of minority legislators in Georgia (as well other current and former minority elected officials). The data showed, among other things, that the number of people in Georgia who already possessed a valid photo identification greatly exceeded the total number of registered voters and that there was no racial disparity in access to the identification cards. The State subsequently adopted, and the

Department precleared in April 2006, a new form of voter identification that would be available to voters for free at one or more locations in each of the 159 Georgia counties.

It is important to note that no court decision has called into question the Department's preclearance decisions regarding the 2006 Georgia decision. On September 6, 2007, the Federal district court dismissed the challenge to the Georgia voter ID law noting, among other things, that the plaintiffs had identified no individual who did not have or could not obtain the requisite ID. The court also rejected plaintiffs' data analyses purporting to show problems with the ID law as unreliable and/or irrelevant.

Similarly, Georgia's Supreme Court recently directed that the State case be dismissed for lack of standing. As in the Federal case, no plaintiff actually was harmed by the statute.

b. Last year, the President signed into law a measure reauthorizing the Voting Rights Act, one of the cornerstones of America's civil rights laws. The reauthorization passed Congress overwhelmingly, garnering votes of 390-33 in the House and 98-0 in the Senate. The text of the statute contains extensive legislative findings supporting the reauthorization and we passed the reauthorization with the support of evidence gathered in nine hearings and thousands of pages of testimony and reports before the Senate Judiciary Committee alone showing the continued need for the remedies contained in Section 5. Do you believe it is consistent with the will of Congress as demonstrated in the initial passage of the Voting Rights Act and subsequent reauthorizations for a Justice Department officials tasked with Section 5 pre-clearance duties simultaneously to draft and publish a pro Voter ID op-ed?

Answer: Please see response to subpart a above. In addition, the Department is vigorously defending the constitutionality of the Voting Rights Act in ongoing litigation. *See Northwest Austin Mun. Util. Dist. v. Gonzales*, No. 06-1384 (D.D.C.). The three judge panel heard oral argument in this case on September 17, 2007.

3. I am disturbed by reports of the decimation of Voting Section staff assigned to review and make determinations on Voting Rights Act Section 5 preclearance submissions. According to the March 22, 2007 House Judiciary testimony of Joe Rich, former Chief of the Voting Section, there were 26 civil rights analysts and six attorneys working on Section 5 issues in 2001 and now that staff has been substantially reduced by almost two-thirds to only ten civil rights analysts and two attorneys. It is difficult to understand how this Administration expects to fulfill its Section 5 duties under the Voting Rights Act with such a reduced staff.

a. How do you account for the reduction of Section 5 staff by almost two-thirds in a six year period? Please explain the motivations for

such deep staff reductions and explain how the current number of Section 5 staff compares to the number present during the previous administration?

Answer: The statistics cited in the question are incorrect. While four attorneys currently are devoted primarily to Section 5 review, all attorneys, including managers, participate in the review of voting changes under Section 5 as the need arises. In terms of civil rights analysts, in January 2001, the Section had 14 civil rights analysts, compared to 12 in January 2007. As of July 10, 2007, the Voting Section has 10 civil rights analysts and two contract personnel engaged in the analysis of Section 5 submissions, and the Section has advertised three civil rights analyst openings. The Section also has become very energetic in training interns and externs to analyze the more routine voting changes.

b. Are you confident that the Voting Section can accomplish its very important Section 5 work – particularly with the coming redistricting cycle – with such a reduced staff? Please explain your plan for the future of Section 5 preclearance case work.

Answer: Please see the response to subpart a above. All current professional staff members, including attorneys, are receiving valuable experience reviewing Section 5 submissions. In addition, the Section also has initiated E-Submissions so that governments can submit voting changes on-line. Among other advantages, this will free significant staff time and resources for more effective review of voting changes.

c. How are these staff cuts consistent with the will of Congress as expressed in the recent reauthorization of Section 5 of the Voting Rights Act, which passed Congress by an overwhelming margin?

Answer: Please see the response to subparts a and b above.

3. *[sic]* **Last November Joe Rich, the former Chief of the Voting Section, testified before our Committee that, under the Bush Justice Department, "[p]olitical appointees [] intruded into the attorney evaluation process, something that did not happen in the past." In a March 29, 2007 op-ed in the *Los Angeles Times*, Mr. Rich reports that his predecessor John Tanner ordered him "to change performance evaluations of several attorneys under my supervision." Even more disturbing, Mr. Rich reports that he was "told to include critical comments about those whose recommendations ran counter to the political will of the administration and to improve evaluations of those who were politically favored."**

What have you done to determine whether the evaluation of any attorney in the Civil Rights Division has been changed based on their political

affiliation? What are you doing to ensure that this done not continue to occur?

Answer: The *L.A. Times* article does not state that John Tanner ordered Mr. Rich to change performance evaluations. Additionally, John Tanner was Mr. Rich's successor as Chief of the Voting Section, not his predecessor. John Tanner did not supervise Mr. Rich, and was not involved in reviewing performance evaluations during Mr. Rich's tenure in the Voting Section.

The evaluation of career attorneys has historically involved the input and collaboration of *both* career management and political appointees. The form used to appraise the performance of career attorneys in the Civil Rights Division has contained some three to seven performance-related elements (depending on the work of the Section) on which an attorney is evaluated; a brief narrative typically accompanies the actual evaluation. Each rating involves a "rating official" (typically, a career section chief) and the "reviewing official" (typically, a political appointee). As has been true for years, both officials sign the final rating; hence, both are expected to attest to it. The involvement of political appointees in this process – whether in editing the narrative or in changing the actual evaluation – is neither unusual nor unwarranted. Assistant Attorney General Kim worked collaboratively and harmoniously with career management in carrying out this responsibility. Assistant Attorney General Kim worked to ensure that attorneys were evaluated based on their performance and work for the Division, not political affiliation.

4. According to a recent report by the Citizens' Commission on Civil Rights, entitled, "Erosion of Rights," since 2002, seven Chiefs or Deputy Chiefs of the Civil Rights Division "who were considered to have views that differed from those of then political appointees were reassigned or stripped of major responsibilities." In 2005, Albert Moskowitz, Chief of the Criminal Section was removed and given a job in a training program. Shortly after that, Bob Berman, the Deputy Chief in the Voting Section was transferred to the same office.

a. Did you have any personal involvement in the reassigning, or did you instruct another person to reassign, the Chief of the Criminal Section or the Deputy Chief of the Voting Section to a job training program? Are you aware that this occurred?

Answer: Assistant Attorney General Kim fully supported the decision that, from a management perspective, the Division would best be served by having Mr. Moskowitz serve as the head of the Professional Development Office. Assistant Attorney General Kim approved the transfer of Mr. Berman to the Professional Development Office.

b. Were any of these individuals transferred for nonperformance reasons? If not, why were these individuals reassigned or stripped of their duties?

Answer: Mr. Berman and Mr. Moskowitz were transferred because the Division's leadership concluded that doing so would best serve the needs of the Division.

Mr. Berman requested and received a detail with the Administrative Office of the United States Courts, which he completed from September 26, 2005 to January 27, 2006. Mr. Berman decided to pursue this detail in connection with a program designed to better prepare employees for becoming a candidate for the Senior Executive Service. Since Mr. Berman's return to the Civil Rights Division, he has served in a senior position in the Office of Professional Development.

c. Were any of these individuals reassigned or transferred based on perceived disloyalty to the Division's political appointees?

Answer: Mr. Berman and Mr. Moskowitz were transferred because the Division's leadership concluded that doing so would best serve the needs of the Division.

5. Last month, Monica Goodling, a former Justice Department political appointee, testified before Congress that she "crossed the line" in considering the political beliefs of applicants for nonpartisan legal jobs in the Justice Department. And the *Washington Post* reported that Brad Schlozman, former Acting Assistant Attorney General for the Civil Rights Division, directed supervisors to transfer three female minority attorneys to "make room for some good Americans." I understand that the Justice Department Office of the Inspector General has opened an investigation into whether or not political appointees at the Justice Department illegally took party affiliation into account in hiring career attorneys.

When considering, recommending or approving candidates for appointment to career positions at the Department, have you ever considered applicants' political party affiliation, ideology, membership in a nonprofit organization or loyalty to the President, or otherwise screen potential career hires for political allegiance? If so, please provide details. Are you aware of whether others at the Department ever considered those factors in making decision regarding career hires? If so, whom? Please provide details.

Answer: The Civil Rights Division, like every other component of the Department of Justice, is charged with enforcing the laws passed by Congress. As such, we seek to hire outstanding attorneys with demonstrated legal skills and abilities. The Department considers attorneys from a wide variety of educational backgrounds, professional experiences, and demonstrated qualities, and attorneys from an extremely wide variety of backgrounds have been hired to work in the Division during Assistant Attorney General Kim's tenure here.

All of the attorneys hired by the Civil Rights Division are expected to be able to vigorously enforce the Federal laws prohibiting discrimination. This is why we measure

an applicant's talent, excellence, and commitment to the work of the Division. Every applicant is unique and is treated as such during the hiring process. In general, however, a number of factors may be considered in assessing an applicant's commitment to the work of the Division, including an applicant's reasons for wanting to work in the Division; understanding of the work and mission of the Division; personal background and interests; and demonstrated interest in and understanding of the laws enforced by the Division. During the hiring process, a candidate's stated membership in any group or organization is noted. We are well aware, however, that mere membership in any organization is hardly a reliable method for determining a candidate's legal skills or the personal qualities necessary to being an attorney in the Civil Rights Division.

Finally, the Division's career Section Chiefs play a central role in the hiring of attorneys through both the Honors Program and lateral hiring process, including active participation in interviewing both lateral and Honors Program applicants. We take very seriously the recommendations of Section Chiefs in all personnel matters.

6. At the June 2007 Civil Rights Division Oversight Hearing Senator Whitehouse asked about what actions you are taking to remedy the charges that "the internal administration of your division has been driven by politics, that hiring has been driven by politics, that performance evaluations have been driven by politics, that assignments within the division have been driven by politics."

a. Besides establishing a senior staff retreat, an internal ombudsman, and a Professional Development Office, you failed to fully answer Senator Whitehouse's important question. Now that you have had time to reflect on your answer, what specific actions have you taken to remedy the aforementioned charges levied against your Division?

Answer: During his tenure as Assistant Attorney General, AAG Kim's policy was to make legal decisions based on the outcome as dictated by the law as applied to the facts. A similar philosophy guided his decision-making process as it pertained to the internal administration of the Division, hiring, performance evaluations, and assignments. That philosophy is that the Division should hire attorneys who have a demonstrated record of excellence, who are talented attorneys consistent with that record of excellence, and who share a commitment to the work of the Division. Assignments and other personnel-related decisions are based on merit, not politics. Performance evaluations are intended to reflect as accurately as possible the employee's performance during the rating period. As for additional specific actions that have been taken to assure employees of this standard of fairness, on June 29, 2007, the attached memorandum was distributed to each of the Division's section chiefs and posted on the Division's intranet.

b. You testified that some of the attorneys removed by Mr. Schlozman have been reinstated to the Division since you took over. In particular, you said that "some of the people removed from the

[Appellate] section are back in the section, based upon decisions that I've made starting more than a year ago." Please name the individuals who have been reinstated into the Division after their removals by Mr. Schlozman, and tell the Committee the reasons these individuals were removed or transferred, and the reasons you decided to restore them to their former positions.

Answer: It was AAG Kim's decision to have Tovah Calderon, Teresa Kwon, and Karen Stevens returned to the Appellate Section. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

c. **The June 21, 2007 *Washington Post* article, entitled "Political Hiring in Justice Division Probed," described a Civil Rights Division tainted by politicization of appointments and case assignments by your predecessor Brad Schlozman. At the oversight hearing, you suggested that the allegations in that article were either untrue or that circumstances had changed substantially on your watch. What specifically do you dispute about the charges made about your Division in the June 21 *Washington Post* article? And what specific steps have you taken to ensure that changes have been made?**

Answer: Please see the response to subpart a above.

7. **Your predecessor, Assistant Attorney General Alex Acosta, sent an unusual letter on the eve of the 2004 elections to Judge Susan Dlott of the U.S. District Court for the Southern District of Ohio. According to a *McClatchy* article from June 24, 2007, entitled "Ex-Justice official accused of aiding scheme to scratch minority voters," Judge Dlott "was weighing whether to let Republicans challenge the credentials of 23,000 mostly African-American voters." At the time, Judge Dlott had a case pending before her involving allegations that Republicans sent a mass mailing to racial minority voters and then used undeliverable letters to compile a list of voters vulnerable to eligibility challenges. The *McClatchy* article reports that AAG Acosta's letter to Judge Dlott "argued that it would undermine the enforcement of state and federal election laws if citizens could not challenge voters' credentials."**

a. **Do you believe that *ex parte* communication by a Justice Department official to a federal judge on a pending voting case is proper conduct on the eve of an election?**

Answer: On October 29, 2004, the Department of Justice filed a three paragraph letter brief, in lieu of a longer pleading, in the matter of *Spencer v. Blackwell*, Case No. 04CV738. This letter brief was properly filed with the court, with notice to parties. It is

proper for the Department of Justice to present its views to courts regarding the application, interpretation, or enforcement of Federal law, as it did in this case.

b. I am deeply concerned that a letter from Justice Department official to a federal judge on a pending voting rights matter, siding with a partisan scheme to suppress the voting rights of minority citizens, may violate ethical canons and DOJ rules, and may even be criminal conduct. Has the Justice Department opened an investigation into this matter? If not, why not?

Answer: As an initial matter, it is proper for the Department of Justice to present its views to courts regarding the application, interpretation, or enforcement of Federal law, as it did in this case. Such communications to a court by the Department of Justice do not in any way violate ethical canons or DOJ rules or constitute improper conduct of any kind.

We note, moreover, that the letter brief filed by the Department of Justice in this matter directed the court's attention to provisions of Federal law (HAVA and the Voting Rights Act) that the Department felt the court should be aware of, and that, contrary to the article's suggestion, the letter brief did not recommend to the judge how she should rule, or which parties' arguments she should adopt, after she reviewed the facts as applied in that case. Even if it had, however, it is proper for the Department of Justice to take positions in Federal cases that involve the application, interpretation, or enforcement of Federal law.

c. Did Hans von Spakovsky, a counsel in the Voting Section at the time, have any role in the discussions, preparation, or drafting of the letter to Judge Dlott? If so, please explain your answer in detail.

Answer: The Department has substantial confidentiality interests in our deliberative process relating to these matters.

d. Are you aware of any other such letters written by Department officials around the time of the 2004 election, the 2006 election, or at any other point, that could similarly have influenced or informed the outcome or deliberation of a voting rights case?

Answer: Yes. On November 2, 2004, Sheldon Bradshaw, Principal Deputy Assistant Attorney General, filed a two paragraph letter brief in a matter before the Hon. Sidney H. Cates, IV, Civil District Court, Parish of Orleans, calling the court's attention to Section 302(c) of HAVA, which states that although HAVA does not require extending the hours that polls are normally open according to State law, it does require that any voters casting ballots pursuant to a court ordered extension must do so by provisional ballot. This letter brief is attached.

8. **I am concerned about reports of voter suppression tactics aimed at urban and minority communities that have been used in recent elections to intimidate voters from participating in the political process. According to an October 29, 2004 *Washington Post* article entitled "GOP Challenging Voter Registration," one such scheme, called "vote caging," was used by the Republican National Committee in the 1980s when direct-mailings were sent to predominantly minority communities in New Jersey and Louisiana. If those letters were returned as undeliverable then the Republican National Committee would compile a challenge list to remove these potential voters from the polls. The RNC allegedly ceased the practice following a 1986 consent decree.**

Yet, in October 2004, BBC Television Newsnight disclosed that Tim Griffin, then Chief of Communications for the Bush-Cheney campaign, had participated in a vote caging scheme targeting 70,000 voters in Florida for potential challenge as "fraudulent" voters. At least one analysis, conducted by the website tpmmuckraker.com, has shown that on this list "most names were of African-Americans." None of those targeted were found to be fraudulently registered. Mr. Griffin was later appointed, without Senate confirmation, as the interim U.S. Attorney for the Eastern District of Arkansas to replace Bud Cummings.

Your testimony suggests that you did not believe that these charges of "vote-caging," which implicated Mr. Griffin, had been brought to the attention of the Civil Rights Division. You stated "I'd like to have the opportunity to double check that and get back to you." Having had an opportunity to reflect, can you tell us whether anyone at the Civil Rights Division was aware that the Republican National Committee and Mr. Griffin engaged in 'vote caging' during the 2004 elections? If not, why not? And are you concerned that someone at the Justice Department should have been aware of these allegations?

Answer: Please see the attached letter from the Department to Chairman Leahy dated July 3, 2007, confirming that it does not appear that any such information was received by the Division.

During this Administration, the Division has been vigilant and aggressive in its enforcement, outreach, and training efforts across the full breadth of its jurisdiction, including proteeting equal access to the ballot box. For example, the Division has undertaken what is by far the most vigorous election monitoring program in history. During calendar year 2004, a record 1,463 Federal observers and 533 Department personnel were sent to monitor 163 elections in 106 jurisdictions in 29 States. This compares to the 640 Federal observers and 110 Department personnel deployed during the entire 2000 presidential calendar year. In 2006, another record was set for the mid-term elections with more than 800 Federal observers and Department personnel sent to

monitor polling places in 69 jurisdictions in 22 States on Election Day. In November 2006, the Department opened multiple phone lines in order to handle calls from citizens with election complaints, as well as an internet-based system for reporting problems. The Department's election monitoring program also has been very active in non-Federal election years. In calendar year 2005, for example, 640 Federal observers and 191 Department personnel were sent to monitor 47 elections in 36 jurisdictions in 14 States. The current "off-year" monitoring program is more aggressive than the presidential year program of 2000.

9. At last November's Civil Rights Division Oversight Hearing, I asked you about a letter Senator Kennedy and I sent you last October requesting a federal investigation into the activities of Republican congressional candidate Tan Nguyen. Mr. Nguyen admitted that his campaign staffers sent letters to 73,000 households, spreading misinformation about voting requirements apparently designed to suppress Latino voter turnout. In your April 11, 2007 responses to my written questions from the November 16, 2006 Civil Rights Division Oversight hearing, you assured me that an investigation into the Orange County case was ongoing. Can you update me on the status of the Department's investigation?

Answer: Upon learning of the Orange County mailing, the Division immediately initiated an investigation. In addition, the Division also dispatched Department personnel to monitor the polls in Orange County for the November 7, 2006, elections. The matter remains the subject of an ongoing investigation. It would be inappropriate to discuss the details of an ongoing investigation. The California Attorney General's Office also initiated an investigation into the matter but determined that there was insufficient evidence to bring a prosecution.

10. You stated in your written testimony that "[f]rom November 9, 2005 to June 12, 2007 the Appellate Section filed 167 briefs . . . [and] ninety three of those filings were appellate briefs for the Office of Immigration Litigation." That means that well over half of the Appellate Section's filings were briefs that have nothing to do with civil rights. Do you share my concern that precious appellate resources have been diverted from protecting the civil rights of Americans to non-civil rights matters? If not, why not?

Answer: Attorneys in all of the Department's litigating Divisions and every United States Attorney's Office are assisting in handling the extraordinary caseload of immigration briefs. While the Civil Rights Division's Appellate Section shares in these responsibilities as well, the Appellate Section is still doing tremendous work. Overall during FY 2005 and 2006, the Appellate Section filed more briefs than in any fiscal year for which the Appellate Section has maintained such statistics since 1977. During FY 2006, the Division's Appellate Section filed 145 briefs and substantive papers in the United States Supreme Court, the courts of appeals, and the district courts. Excluding decisions by the Office of Immigration Litigation ("OIL"), the Appellate Section had an

overall success rate of 90% during this period, which is the highest success rate the Section has had for any fiscal year since FY 1992. In FY 2006, the Appellate Section filed 17 amicus briefs, an increase over the previous two fiscal years. As of July 31, 2007, the Appellate Section had filed a total of 102 amicus briefs under this Administration.

11. The report from the Citizens' Commission on Civil Rights, entitled "Erosion of Rights," reports that "[w]hen drafting briefs in controversial areas, appellate staff were on several occasions instructed not to share their work with the trial sections until shortly before or when the brief was filed in court." Are you aware of any occasion where such instructions were given? If so, please explain all instances in detail. What remedial actions have you taken to eliminate any perception that communication between the appellate and trial sections are discouraged?

Answer: During his tenure as Assistant Attorney General, AAG Kim fostered active, open communication among the Division's Sections, including the Appellate Section and the trial sections. For instance, AAG Kim instituted a monthly meeting of the Division's Section Chiefs. At those meetings, the Section Chiefs discuss pending matters in each of their Sections. In addition, AAG Kim has encouraged the trial sections to consult with the Appellate Section on difficult legal issues that might arise during the course of litigation. During his tenure, **AAG Kim is not aware of any instructions to Appellate Section attorneys preventing them from discussing their civil rights cases with attorneys in other Sections who served as trial counsel in the same litigation.**

12. In 2006, the FBI announced a cold case initiative to identify and investigate racially- motivated murders committed during the civil rights era. I understand that 56 FBI Field offices combed their files searching for cases which may be ripe for investigation. And in February of 2007, the FBI announced a partnership with the Southern Poverty Law Center, NAACP, and National Urban League to assist the FBI in identifying additional cases for investigation.

a. Are you confident that the FBI has made available to your Division all of the files it has on unsolved civil rights era murder cases?

Answer: The Civil Rights Division is working in an ongoing and cooperative manner with the FBI on the "Cold Case" Initiative.

b. At a Harvard Law School conference last month titled, "Crimes of the Civil Rights Era" former FBI agents, former Justice Department attorneys, and former federal prosecutors all commented that the role of the media would be vital in bringing these cases to the forefront. What efforts, if any, have the Department taken to share information with the media in identifying other unsolved civil rights era cases?

Answer: The media can play an important role in the unearthing of potential civil rights era cases and the discovery of critical evidence in such cases. With this in mind, the Attorney General, the Director of the FBI and the Assistant Attorney General for Civil Rights held a press conference in February 2007 to announce a partnership with the Southern Poverty Law Center, the National Association for the Advancement of Colored People, and the National Urban League to assist the Department in identifying civil rights era cases that may be prosecutable. The press conference was also designed to raise awareness throughout the nation regarding unresolved civil rights era cases with the hope of encouraging citizens to come forward with any information that might assist the Department in the investigation of these matters.

Moreover, Department officials have appeared on a variety of media outlets to further publicize the Department's efforts to identify, investigate, and prosecute unsolved civil rights era matters.

13. **In your testimony before this Committee you stated the Emmett Till Unsolved Civil Rights Crime Act would help "facilitate investigations of over 100 civil rights era murders identified by the FBI." Please tell this Committee the exact number of cases that the FBI has identified for investigation and the exact number of cases that the Civil Rights Division has identified for investigation. How many of these cases are actively being investigated? And how many of those cases are currently being prosecuted?**

Answer: In February 2007, the Attorney General and the FBI announced an initiative to identify other unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of Federal law. As part of this initiative, the FBI announced the next phase of this initiative, which includes a more formal partnership with the National Association for the Advancement of Colored People, the Southern Poverty Law Center, and the National Urban League to assist the FBI in identifying additional cases for investigation and to solicit their help. These organizations have already provided the FBI with valuable information from their files, and the Department will follow those and future leads. The FBI has identified 102 cases that merit additional review to determine whether Federal criminal charges could be brought. The Civil Rights Division is working closely with the FBI to determine which of these matters present sufficient evidence and satisfy jurisdictional and constitutional requirements to warrant a Federal prosecution.

Most recently, the Department successfully prosecuted former KKK member James Seale, now 71, for his role in the 1964 abduction and murder of two 19-year-old African-American men, Charles Moore and Henry Dee, in Franklin County, Mississippi. On June 14, 2007, a jury in the Southern District of Mississippi convicted Seale for the Federal crimes of kidnapping and conspiracy. There are no other civil rights era cases under Federal indictment at this time. However, on May 9, 2007, the State of Alabama indicted James Fowler, a former Alabama State Trooper, on State murder charges for the 1965

murder of Jimmy Lee Jackson, who was killed during a civil rights march in Marion, Alabama.

14. **Grace Chung Becker, a Deputy Assistant Attorney General in the Civil Rights Division, testified this month before two subcommittees of the House Judiciary Committee on the Till bill. In her written statement, Deputy Assistant Attorney General Becker contended that Ex Post Facto concerns and federal law will limit the Department's ability to prosecute most civil rights era cases. In particular she stated that "statute of limitations bars federal prosecutions of many of these cases." However, her written statement also maintained that "the Division has used non-civil rights statutes to overcome the statute of limitations challenge." Please inform this Committee of each instance where the Department has brought a prosecution of a civil rights era murder with a non-civil rights statute? When non-civil rights statutes were used, how successful were those prosecutions?**

Answer: Two of the most important statutes that can be used to prosecute racially motivated homicides, 18 U.S.C. § 245 (interference with federally protected activities) and 42 U.S.C. § 3631 (interference with housing rights), were not enacted until 1968. Under the Ex Post Facto Clause, these statutes cannot be applied retroactively to conduct that was not a crime at the time of the offense. Moreover, the five-year statute of limitations on Federal criminal civil rights charges would present another limitation on such prosecutions. Prior to 1994, all Federal criminal civil rights statutes carried a five-year statute of limitations, even in cases where death resulted. In 1994, the statutes were amended to provide the death penalty for civil rights violations that resulted in death. Under 18 U.S.C. § 3281, crimes punishable by death have no statute of limitations. However, the Ex Post Facto Clause again prevents the retroactive application of the 1994 change in penalties, and the resultant change in the statute of limitations.

Despite these constitutional and jurisdictional hurdles, the Department has successfully prosecuted civil rights era murder cases under other Federal criminal statutes. On June 14, 2007, for example, a Federal jury in Jackson, Mississippi, convicted James Seale on two counts of kidnapping (18 U.S.C. § 1201(a)) and one count of conspiracy to kidnap (18 U.S.C. § 1201(c)) for his role in the 1964 abduction and murder of 19-year-old Charles Moore and Henry Dee. Seale was sentenced to three life terms in prison. This prosecution was possible because the evidence revealed that the defendant abducted the victims and transported them across State lines before killing them by throwing them into the Old Mississippi River. The Federal government's jurisdiction was based on the fact that the Federal kidnapping statute was a capital offense at the time of the incident in 1964.

The successful prosecution of Ernest Avants in 2003 is another instance in which we were able to use non-civil rights charges to overcome the statute of limitations problem and bring a successful prosecution. A statute enacted in 1948, 18 U.S.C. § 1111 (murder on Federal land), provides for the death penalty for first degree murder within the special

maritime and territorial jurisdiction of the United States. In 2002 and 2003, the Criminal Section was able to use this statute to investigate and prosecute Avants, a Mississippi Ku Klux Klan member, who murdered an African-American man in 1966 in a National Forest.

The Department also plays an important role and expends significant resources in cases that do not ultimately result in a Federal prosecution. In 1997, the FBI reopened the investigation into the 1963 bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama. Civil Rights Division attorneys worked with the United States Attorney for the Northern District of Alabama in conducting a grand jury investigation. We were able to assume Federal jurisdiction because a predecessor statute to the current arson and explosives statute, 18 U.S.C. § 844, provided that in situations where death resulted from an explosive transported in interstate commerce, the penalty was death, and under 18 U.S.C. § 3281, crimes punishable by death have no statute of limitations. Ultimately, we could not prove that the explosive traveled in interstate commerce, so we released the grand jury investigation to the State of Alabama, which used that investigation as the basis for a successful prosecution of the last two defendants who were involved in the bombing. The United States Attorney for the Northern District of Alabama was cross designated to serve as the lead prosecutor in the State trials. Thus, this case was investigated by Federal agents and a Federal grand jury, and the case was ultimately successfully prosecuted by a Federal prosecutor in State court -- another example of the Department's efforts to find creative ways to pursue civil rights era cases.

The Federal Bureau of Investigation also worked with Mississippi authorities to investigate the 1955 murder of Emmett Till, a 14 year-old African-American teenager, who was kidnapped and killed in rural Mississippi. The investigation showed that there was no Federal jurisdiction. Thus, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi, for her consideration. A State grand jury in Mississippi declined to indict the case.

The Civil Rights Division and the FBI reinvestigated the June 2, 1965, ambush of O'Neil Moore and David Creed, two African-American deputy sheriffs in Washington Parish, Louisiana. The two deputy sheriffs were ambushed while they were patrolling in their police car. Moore was killed and Creed was seriously injured during the attack. The investigation into this incident was reopened in 1988, however, the Department was unable to develop sufficient evidence to bring Federal criminal charges against those involved in the ambush and murder.

The FBI assisted the local law enforcement authorities in tbe reopened investigation into the 1964 the murder of three civil rights workers in Philadelphia, Mississippi - an incident commonly known today as the "Mississippi Burning" case. At the time of the murders, the Assistant Attorney General of the Civil Rights Division, John Doar, personally led the investigation and prosecution of these murders. He was able to secure the convictions of only 7 of the 18 defendants charged with these murders; and they received sentences ranging from just 4 to 10 years of imprisonment. One of the

ringleaders, Ku Klux Klan member, Edgar Ray Killen, was acquitted because one of the jury members refused to convict a "preacher." The Department, however, remained committed to ensuring that justice eventually prevailed in that case. The FBI worked with the local law enforcement authorities on the reopened investigation which resulted in the indictment of Killen on three counts of State murder charges on January 6, 2005. Killen was finally convicted for his involvement in the case on June 21, 2005.

15. Last November I asked you about an incident of voter intimidation and suppression in the 9th precinct in Tucson (Pima County), Arizona, an area with a heavy percentage of Hispanic Americans. It was reported that three vigilantes armed with a clip board, a video camera, and a visible firearm stopped only Latino voters as they entered and exited the polls on Election Day, issuing implied and overt threats. You answered that "both the Criminal Division and the Civil Rights Division have opened investigations into the Pima County allegations" and that you could not comment further on an ongoing investigation. When I asked the Attorney General for an update in January, he gave me the same answer.

a. Can you update me on the current status of the Civil Rights Division's Pima County investigation?

Answer: A Federal criminal investigation was initiated, but it did not produce evidence sufficient to prove a violation of Federal criminal laws beyond a reasonable doubt. The matter has been referred to the Voting Section of the Civil Rights Division for further investigation and assessment. We are prepared to take any legal action that the facts and the law warrant.

b. What steps have you taken to ensure that the type of voter suppression tactics witnessed in Pima County are not repeated in the next election?

Answer: The Civil Rights Division is committed to investigating and prosecuting incidents involving voter suppression. While the majority of all criminal investigations related to voting have been assigned to, and are handled by, the Criminal Division, the Civil Rights Division coordinates with the Criminal Division in examining certain possible violations. See 28 C.F.R. §§ 0.50, 0.55. The determination of which office takes the lead in a case will, in the ordinary course, depend on the nature of the various allegations involved, the evidence available at the outset of a case (when initial assignment is made), the likely availability of additional evidence, the legal elements that need to be proved under relevant statutes, and the penalties available. For example, depending on the evidence developed, multiple criminal statutes may be implicated by the conduct. Subsequent investigation that materially alters the balance of factors may be a basis for reassignment of the investigation.

Where a determination is made that a violation of Federal criminal law cannot be proved beyond a reasonable doubt, the case may be referred to the Voting Section of the Civil Rights Division to determine if a civil remedy may be available.

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Questions Posed by Senator Kennedy:

1. **At the June 21, 2007 oversight hearing on the Civil Rights Division, I asked whether you agree that the Division has filed only one case alleging racial discrimination in voting on behalf of African Americans during the current Administration. The case to which I was referring was the United States v. Euclid, Ohio, which was not filed until 2006. You stated that the Division has filed between 5 and 15 cases alleging racial discrimination in voting against African Americans since President Bush took office. Neither the Division's website, your letter on this issue of November 9, 2006, nor your April 11, 2007 answers to written questions support your estimate of the number of cases filed by this administration to protect African Americans from racial discrimination in voting. To clarify this issue, please provide the following information:**

   a. **For each suit authorized by the current Administration alleging racial discrimination against African Americans under Section 2 of the Voting Rights Act of 1965, as amended, the name of the case and the date on which it was filed.**

Answer: As stated in the attached letter from Principal Deputy Assistant Attorney General Richard Hertling to Chairman Leahy dated July 3, 2007, during this Administration, the Voting Section of the Civil Rights Division has filed four cases and successfully litigated a fifth, in addition to interposing thirty-six Section 5 objections, on behalf of African-American voters in various jurisdictions. The cases filed include *United States v. Crockett County* (W.D. Tenn.; filed April 17, 2001; alleged that the method of electing the county's board of commissioners violated Section 2 because it diluted the voting strength of African Amerian voters); *United States v. Euclid* (N.D. Ohio; filed July 10, 2006; alleged that the method of electing the city council violated Section 2 because it diluted the voting strength of African-American citizens); *United States v. Miami-Dade County* (S.D. Fla.; filed June 7, 2002; alleged that county poll officials effectively prevented Haitian-American voters from securing assistance at the polls from persons of their choice in violation of Section 208); and *United States v. North Harris Montgomery Community College District* (S.D. Tex.; filed July 27, 2006; alleged the district attempted to reschedule its trustee and bond election without obtaining the requisite determination under Section 5 that the change would be free of a retrogressive purpose and effect prior to implementing the change), which also involved protecting the rights of Hispanic citizens. In addition, we successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.; filed January 17, 2001; alleged that the at-large method of electing members of the Charleston County Commission violated Section 2 by diluting the voting strength of African American voters) and successfully defended that victory through appeal to the U.S. Supreme Court. *Crockett County*, *Euclid*, and *Charleston County* are all Section 2 cases. *United States v. Miami-Dade*

County alleges a violation of Section 208 and *United States v. North Harris Montgomery Community College District* alleges a violation of Section 5.

b. For each suit authorized by the current Administration under Section 5 of the Voting Rights Act of 1965, as amended, which alleges that a proposed voting change is retrogressive and diminishes the opportunity of African Americans to participate in the electoral process because of their race, the name of the case and the date on which it was filed.

Answer: A claim filed by the Section under Section 5 of the Act would allege that the change in question has not received the requisite clearance from the United States District Court for the District of Columbia or from the Attorney General. It is not necessary or relevant to allege that the change is in fact discriminatory. Judicial determinations as to a discriminatory purpose or effect are reserved for the District of Columbia court. In that court, the Department is a statutory defendant and does not bring the lawsuit.

c. For any other suit authorized by the current Administration that you believe alleges race discrimination in voting against African Americans, the date on which it was authorized, and the date on which it was filed. In addition, for each such case, please provide a brief factual description. If this case was not identified in your November 9, 2006 letter or your previous answers to written questions, please explain the reasons for that omission.

Answer: Please see the response to subpart a above.

d. In your April 11, 2007 answer to question 1(c) of my written questions to you on voting rights enforcement, you referred to a lawsuit filed by the Division in 2006 under Section 5 of the Voting Rights Act to vindicate the rights of African Americans and other voters. Please state the name of the lawsuit, and whether the claims raised on behalf of African Americans were based on race.

Answer: On July 27, 2006, we filed a complaint in *United States v. North Harris Montgomery Community College District* (S.D. Tex. 2006), alleging a violation of Section 5 of the Voting Rights Act. The complaint alleged that the district attempted to reschedule its trustee and bond election without obtaining the requisite determination under Section 5 that the change would be free of a retrogressive purpose and effect prior to implementing the change. The consent decree, which was entered by a three judge court on August 4, 2006, required the district to refrain from implementing any voting change without first obtaining either administrative or judicial preclearance pursuant to Section 5. The decree also required defendants to reschedule the cancelled election to November 7, 2006.

For the reasons set forth in response to (b), above, the complaint itself did not allege discrimination.

e. If the answers to questions 1.a- 1.d. above, confirm that the Division has filed only very few cases alleging racial discrimination against African Americans in voting, please explain the reasons why such cases have received such low priority in this Administration.

Answer: The Department of Justice brings cases where it finds a violation of the law based upon the facts that would be sufficient for the Division to prove that violation in court.

The Department remains fully committed to the vigorous and even-handed enforcement of the Voting Rights Act on behalf of all Americans and has brought lawsuits on behalf of African-American voters, Hispanic-American voters, Asian-American voters, Native American voters, and white voters. This Administration also has brought the first lawsuits in history to protect the voting rights of citizens of Vietnamese, Filipino, Korean, and Haitian heritage.

After over 40 years of enforcement by the Department, legal advocacy groups, and individual attorneys, the number of at-large election systems that discriminate against African American voters has diminished: once sued, jurisdictions rarely revert to at-large systems. Accordingly, a number of once-vigorous private litigation programs have shifted their focus to policy or to other forms of litigation.

Finally, please see the response to subpart a, above.

2. In your April 11, 2007 answers to written questions you failed to provide a complete response to my questions about the Division's voting rights lawsuit against the City of Euclid, Ohio. Please state:

a. The date on which the Department authorized a formal investigation of the City of Euclid Ohio.

Answer: The investigation was formally opened on December 6, 2002.

b. The date on which Department began any investigation of Euclid's method of electing its city council.

Answer: The investigation was formally opened on December 6, 2002.

c. The date on which Voting Section personnel first began contacting the minority community and requesting election returns to determine whether Euclid's method of election violated the Voting Rights Act.

Answer: This date is not known.

d. The date on which the Voting Section first informed Euclid of its investigation into possible voting rights violations.

Answer: On March 20, 2006, the Department sent the City formal notice of our intent to file suit and an invitation to negotiate a settlement of the case that could be filed simultaneously with the complaint.

3. According to a December 10, 2005 article in the Washington Post, during this Administration, the Division adopted a policy that career staff who review proposed voting changes submitted under Section 5 of the Voting Rights Act may not include written recommendations in the official memoranda forwarded to the Assistant Attorney General for approval. The Post also reported that under this new policy, career staff's recommendation that the Division object to a 2005 Georgia voter photo identification law was "stripped out" of the Section's memorandum and "was not forwarded to higher officials in the Civil Rights Division." This specific allegation has been reported in several other publications as well. Are the specific written recommendations of all career staff who review Section 5 submissions currently included in the memorandum to the Assistant Attorney General analyzing those submissions? If not, please explain why not and state how long this has been the Division's policy.

Answer: It is our understanding that each person involved in the Section 5 analysis shares his or her assessment and recommendation with senior career management, and the ultimate recommendation of the Section is made with the full awareness of the views of each staff member involved in the matter. For those Section 5 recommendations that are forwarded to the Assistant Attorney General, see 28 CFR § 51.3, it is our understanding that the Assistant Attorney General is informed whenever a difference of opinion may exist.

4. As I stated at the oversight hearing, I was appalled to read the article about the Division on the front page of the June 21, 2007 Washington Post, which reported that Bradley Schlozman, a former high-ranking official in the Division, imposed a partisan litmus test on career Division attorneys. You stated that you were shocked by the allegations in that article. Please state specifically which aspects of the article you found shocking.

a. Did you mean to suggest that before the evening of June 20, 2007, you were unaware of the allegations described in the article that attorneys Tovah Calderon, Teresa Kwong, and Karen Stevens had been transferred out of the Appellate Section for partisan reasons?

b. It is my understanding that Ms. Calderon, Ms. Kwong, and Ms. Stevens were allowed to return to the Appellate Section since you became Assistant Attorney General. Is that correct? If so, please explain how you could have been unaware of the concerns about their involuntary transfers out of the Section.

c. Do you now acknowledge the transfers of Ms. Calderon, Ms. Kwong, and Ms. Stevens were improper?

d. Was it your decision to allow these attorneys to return to the Appellate Section?

Answer: It was AAG Kim's decision to have Tovah Calderon, Teresa Kwong, and Karen Stevens returned to the Appellate Section. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

5. You stated that "you don't agree with a lot of what people have been doing, or have been said to do." Please describe specifically the actions or allegations with which you disagree.

Answer: There have been a number of allegations recently regarding politicization of hiring and in the decision-making process in the Civil Rights Division. During his tenure as Assistant Attorney General, AAG Kim's policy was always to make legal decisions based on the outcome as dictated by the law as applied to the facts. A similar philosophy guided his decision-making process as it pertained to the internal administration of the Division, hiring, performance evaluations, and assignments. That philosophy is that the Division should hire attorneys who have a demonstrated record of excellence, who are talented attorneys consistent with that record of excellence, and who share a commitment to the work of the Division. During his tenure, assignments and other personnel-related decisions were based on merit, not politics. Performance evaluations have been intended to reflect as accurately as possible the employee's performance during the rating period. To the extent that any of the recent allegations describe practices that deviate from AAG Kim's policies, he disagrees with those practices. Moreover, as he stated in his testimony before the Committee, he believes that some intemperate and inopportune remarks are alleged to have been made in connection with personnel actions previously taken in the Division.

6. You served as a Deputy Assistant Attorney General in the Civil Rights Division for some three years before becoming Assistant Attorney General. Is it your contention that you were unaware that any of the practices alleged in the Washington Post article were taking place?

Answer: The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. The Department of Justice also has substantial

confidentiality interests in any investigatory and/or deliberative processes that may have underscored these decisions. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

7. As a Deputy Assistant Attorney General, did you speak up or in any way attempt to curtail the practices discussed in the Washington Post article of June 21, 2007?

Answer: It was AAG Kim's decision to have the three attorneys reported in the Washington Post article of June 21, 2007, work in the Appellate Section. The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. The Department of Justice also has substantial confidentiality interests in its internal discussions and deliberations. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

8. Mr. Schlozman told this Committee that he had bragged about hiring Republicans for civil service jobs in the Division. Did you ever hear Mr. Schlozman or anyone else in the Division make any comment suggesting that more Republicans should be hired in the Division? Do you agree that those comments would be wholly inappropriate?

Answer: It would be inappropriate to suggest a violation of law, and the Civil Service Reform Act prohibits hiring on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation. The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. The Department of Justice also has substantial confidentiality interests in its internal discussions and deliberations. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

9. According to the Post, Mr. Schlozman said he wanted to replace attorneys in the Appellate Section with "good Americans." When did you first become aware that Mr. Schlozman had expressed such sentiments?

Answer: It was AAG Kim's decision to have the three attorneys reported in the Washington Post article of June 21, 2007, work in the Appellate Section. The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

10. If Mr. Berman requests to be transferred back to the Voting Section, will you permit him to resume his former duties?

Answer: Consistent with AAG Kim's management style and historical practices, any staffing decision would have been made based on the talents and interests of an individual and the needs of the Department. In this process, AAG Kim placed great weight on the judgments of career section management.

11. WJLA TV recently reported that only 2 of 50 attorneys in the Criminal Section were African Americans. You oversaw the Criminal Section even before you were confirmed to head the Division, so you should be very familiar with that Section. Did you ever have any role in hiring career attorneys in the Criminal Section?

Answer: Yes.

12. Do you view the lack of diversity in the Criminal Section's attorney hiring as a problem?

Answer: The Civil Rights Division has hired a diverse group of attorneys from a wide variety of backgrounds. Over the past five fiscal years, 27% of the new attorney hires in the Civil Rights Division were minorities. This is nearly three times the national average, as reported in a 2004 study by the American Bar Association, which found that minority representation in the legal profession is only about 9.7 %. The ABA study also found that nationally, African Americans represent 3.9% of lawyers, or approximately 1 in 25.

In addition, this Administration has promoted as many minorities to section management positions in the Civil Rights Division in 6 years as the previous administration did in 8 years. Indeed, at the end of the previous Administration, the Civil Rights Division employed no minority Section Chiefs. This Administration has promoted two minority Section Chiefs, including the first Hispanic Section Chief in the Division's fifty year history.

13. Did you ever discuss with Mr. Schlozman hiring for the Criminal Section? Did he ever say to you that he was seeking to hire Republicans or conservatives for the Section? Do you agree that this would have been inappropriate?

Answer: It would be inappropriate to suggest a violation of law, and the Civil Service Reform Act prohibits hiring on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation. The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. The Department of Justice also has substantial confidentiality interests in its internal discussions and deliberations. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

14. **Did you ever have any indication that Mr. Schlozman or others were asking the Republican National Lawyers Association to refer candidates to the Divisions? Do you agree that it would have been inappropriate for the Division to conduct it's hiring by soliciting applicants from a partisan organization?**

Answer: It would be inappropriate to conduct hiring based on a candidate's political affiliation. The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. The Department of Justice also has substantial confidentiality interests in its internal discussions and deliberations. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

15. **Did you ever receive resumes that came to you from the Republican National Lawyers Association, either directly or through others?**

Answer: We are not aware of having received such resumes for career attorney positions.

16. **I've asked you before about the transfer of Robert Berman, the Deputy who formerly headed the Voting Section unit charged with enforcing Section 5 of the Voting Rights Act. Your answers have not resolved the basic concern that it appears he was involuntarily transferred because he agreed with the recommendations of other career attorneys to object to the Texas redistricting plan and the Georgia photo ID law. After his detail ended, you decided that he would not be allowed to return to the Voting Section. If Mr. Berman requests to be transferred back to the Voting Section, will you permit him to resume his former duties?**

Answer: Mr. Berman was not transferred in whole or in part in retaliation for any role he played in reviewing the Georgia and Texas preclearance submissions. Mr. Berman requested and received a detail with the Administrative Office of the United States Courts, which he completed from September 26, 2005 to January 27, 2006. Mr. Berman decided to pursue this detail in connection with a program designed to better prepare employees for becoming a candidate for the Senior Executive Service. Since Mr. Berman's return to the Civil Rights Division, he has served in a senior position in the Office of Professional Development. If Mr. Berman requested to be transferred to the Voting Section, that decision would have been made based on the talents and interests of Mr. Berman and the needs of the Department, consistent with AAG Kim's management style and historical practices. In this process, AAG Kim placed great weight on the judgments of career section management.

Questions Posed by Senator Feinstein:

1. **You testified that the attrition rate of attorneys in the Civil Rights Division over the past six years is "not markedly different from" the historical attrition rate for lawyers in the Division under the Clinton administration. Many of the recent revelations regarding low morale and politicized personnel decisions, however, relate to the Voting Section in particular.**

   - **What is the rate at which lawyers have voluntarily left the Voting Section during the current administration?**

   - **What is the rate at which lawyers have been involuntarily transferred out of the Voting Section during the current administration?**

   - **What was the rate at which lawyers voluntarily left the Voting Section during the Clinton administration?**

   - **What was the rate at which lawyers were involuntarily transferred out of the Voting Section during the Clinton administration?**

Answer: Forty-seven attorneys left the Voting Section during the previous Administration. As of AAG Kim's departure in August 2007, forty-three attorneys had left the Voting Section during this Administration and two more were scheduled for departure. The Department does not track numbers of voluntary and involuntary departures.

2. **You testified that your philosophy is "to evenhandedly enforce the law wherever I find violations of that law," and that prosecutors learn to "take the cases that you find and take the violations where they occur." Later you added that your job is "to go out there and try to find as many violations that you can prove" as possible.**

   - **How many of the cases that you have authorized as Assistant Attorney General are based on facts that you *personally* found or that initially came *directly* to you, rather than through one of your subordinates?**

   - **Are you aware of each and every potential violation that comes to the attention of your subordinates in the Division?**

   - **Is it fair to say that the staff in the front office acts as a filter for the cases that come to you? What are you doing to ensure that they are equally committed to evenhandedly enforcing the law and prosecuting violations wherever they occur?**

- **Is it fair to say that the career staff in the Division acts as a filter for the cases that come to you? What are you doing to ensure that they are equally committed to evenhandedly enforcing the law and prosecuting violations wherever they occur?**

- **If the current investigation by the Inspector General and the Office of Professional Responsibility finds that career staff in the Division were hired based on improper political considerations, what will be the specific consequences for those staff members? If staff members who were hired for political reasons remain in place, why should the Committee believe that they are committed to evenhandedly enforcing the law?**

Answer: While the Assistant Attorney General has historically been involved in many litigation decisions, the vast majority of work is conducted by the attorneys and professional staff in the Division. It is fair to say that no one individual can be aware of each of the matters investigated or prosecuted by the Division. The talented staff in the Civil Rights Division, both career and political appointees, work diligently and cooperatively to vigorously enforce the Federal civil rights laws. Those efforts are best measured by record numbers of successful cases brought in many areas of the Division's responsibilities. We are committed to cooperating with the current OIG/OPR investigation and will carefully consider the results of its investigation, as well as any recommendations that the investigation may produce.

3. **You testified that with for all litigation decisions and all other decisions in the Division (aside from personnel actions), you have a "full and candid discussion" about the legal issues with "everyone involved." You added that you agree with the staff recommendation on the vast majority of those decisions, although not every single one.**

   In a recent report of the Citizens' Commission on Civil Rights, three former Division lawyers (including the former chief of the Voting Section) wrote that when staff recommendations on Section 5 preclearance were overruled in past administrations, political appointees prepared memoranda for career staff to explain the legal rationale for their decisions and to form a complete record of the decisionmaking process. They added that the political staff in the current administration did not prepare those explanatory memoranda in at least two controversial preclearance decisions.

- **In addition to having full and candid discussions, do you prepare a written record of your reasoning in the small minority of cases where you disagree with the recommendations of career staff?**

- **If not, why not? Are you willing to reinstitute that practice with respect to preclearance decisions? Are you willing to follow that practice with respect to other significant decisions?**

Answer: During his tenure as Assistant Attorney General, AAG Kim worked hard to ensure open access and open lines of communications between political appointees and career attorneys. He relied on an informal robust internal decisionmaking process. Career staff was involved in the recommendation and decision-making process of every enforcement action brought during AAG Kim's tenure by the Division under the Voting Rights Act, including the review of every Section 5 submission. Every legal analysis, including recommendations under Section 5, was required to be balanced and to include all relevant information. AAG Kim welcomed opposing views and was available for discussion. AAG Kim was always willing to consider any practice that would enhance the decisionmaking process.

4. **In late 2005 you authorized the filing of a lawsuit against the State of Missouri and its Secretary of State, a Democrat. The suit alleged that Missouri was not making a reasonable effort to remove ineligible voters from its voter rolls as required by the National Voter Registration Act. Todd Graves, then the U.S. Attorney in the Western District of Missouri, reportedly was opposed to filing the lawsuit. In April of this year the district court ruled in favor of Missouri, concluding both that DOJ had sued the wrong parties and that DOJ had completely failed to show that any voter fraud had occurred.**

   - **Were you aware that Mr. Graves was opposed to filing the suit? Do you know why he was opposed?**
   - **Please explain in detail the specific factual and legal bases you relied on at the time you overruled Mr. Graves and ordered the suit to be filed.**
   - **Did you communicate with anyone else in the Justice Department about the suit before or after filing it? If so, with whom?**
   - **Did you communicate with anyone in the White House about the suit before or after filing it? If so, with whom?**
   - **How many individuals in Missouri have been convicted for actually voting more than once in the 2004 election?**

Answer: Mr. Graves has testified that he never voiced any opposition to the filing of the lawsuit. Indeed, the United States Attorney's Office for the Western District of Missouri assisted the Civil Rights Division in litigating the case. AAG Kim did not communicate with anyone at the White House regarding this suit before or after suit was filed; prior to the filing of the lawsuit, AAG Kim communicated with other individuals within the Department of Justice, including career members of the Voting Section and other members of his office.

The lawsuit charged that Missouri both improperly removed or suspended eligible voters and failed to remove ineligible voters. The suit did not allege fraud, nor is voter fraud an element of the violations alleged. A few days after the commencement of this lawsuit, Missouri's Secretary of State issued a press release admitting the scope of the problem:

> In last year's election, 29 Missouri counties and election jurisdictions had more persons registered to vote than people of voting age living in the jurisdiction. In one Missouri county, over 150% of the voting age population was registered to vote in the 2004 federal election.
>
> Clearly, a problem exists. It defies common sense that we would have more registered voters than people of voting age in any Missouri county.

5. **In your written testimony you note that in one Missouri county the voter rolls were 151 percent of the county's voting age population. Data from the Election Assistance Commission show that in the same election, there was a county in Texas where over 230 percent of the voting age population was registered to vote. And in Utah, 12 of 29 counties had more than 100 percent of the citizen voting age population registered to vote.**

   - **How many states in 2004 contained counties where more than 100 percent of the voting age population registered to vote? Which states were they?**
   - **How many of those states did the Department sue under the NVRA?**
   - **Of the states that were sued, in how many of them was the chief election official a Democrat?**

Answer: The Civil Rights Division has examined similar apparent discrepancies in many other States. According to a report of the Election Assistance Commission and Census data, there are 10 States in which 10 percent or more of the jurisdictions conducting voter registration had more registered voters than citizens of voting age. The complete list of such States is Iowa, Massachusetts, Mississippi, Nebraska, North Carolina, Rhode Island, South Dakota, Texas, Utah, and Vermont.

The States that have been named as defendants in lawsuits brought by the Voting Section under the NVRA during this Administration are as follows: *United States* v. *State of New Jersey* (D. N.J. 2006); *United States* v. *State of Maine* (D. Me. 2006); *United States* v. *State of Indiana* (S.D. Ind. 2006); *United States* v. *State of Missouri* (W.D. Mo. 2005); *United States* v. *State of New York* (N.D.N.Y. 2004); *United States* v. *State of Tennessee* (M.D. Tenn. 2002).

The political affiliation of the responsible officials in each of these States is not a relevant consideration.

6. **As you note in your written testimony, the Department has appealed the district court's ruling in the Missouri lawsuit.**

   - **Who made the decision to appeal the district court ruling?**

   - **If you were not the decisionmaker, did you communicate with the decisionmaker about whether to appeal the ruling? If yes, what was the substance of that communication?**

   - **Did anyone at the Department communicate with anyone at the White House about whether to appeal the ruling? If yes, who was involved in that communication? What was the substance of the communication?**

Answer: After receiving authorization from the Office of the Solicitor General, AAG Kim made the decision to appeal the District Court's ruling in *U.S.* v. *Missouri*. AAG Kim did not communicate with anyone at the White House about whether to file an appeal.

7. **Bradley Schlozman testified on June 5, 2007 that the Department is "issuing a new book" of guidelines on the prosecution of election crimes.**

   - **Who made the decision to replace the existing guidelines on the prosecution of election crimes? Why was this decision made?**

Answer: The decision to update the Department's 1995 election crimes manual was made several years ago by the management of the Public Integrity Section of the Criminal Division. There had been a number of significant changes in the laws in this area since the last manual was written, including the enactment by Congress of the landmark Bipartisan Campaign Reform Act of 2002, and particularly its enhanced penal consequences for criminal violations of the Federal Election Campaign Act. In addition, there had been a number of significant court decisions in this area of the law since the last manual was published, including the Supreme Court's decision in *McConnell v. Federal Election Commission*, 543 U.S. 93 (2003).

In short, the existing manual was both incomplete and out of date. Accordingly, in 2004, the Public Integrity Section and its Election Crimes Branch began to update the manual. In early 2007, the redrafting process was completed and the manual was published a few months later.

   - **Please explain in detail how the new guidelines will differ from the current guidelines.**

Answer: As an initial matter, it is important to note that the Department's "current guidelines" for investigating and prosecuting election crimes are the guidelines reflected in the 2007 edition of *Federal Prosecution of Election Offenses* – not in the 1995 edition published 12 years ago.

If your question about "new guidelines" is meant to include the entire new manual, this is difficult to answer. The 1995 manual is 135 pages long; the 2007 manual is 241 pages (excluding appendices). There are thus over 100 pages of additional text in the new manual, and this text is spread throughout the entire book.

Two chapters, namely, Chapter Five, which addresses campaign financing crimes, and Chapter Six, which addresses the sentencing of election crimes, received more extensive revision and expansion than other chapters. This additional text was necessary to address effectively the changes to the Federal Election Campaign Act, and in particular the enhancements to the Act's criminal enforcement that were legislated by Congress in BCRA.

- **Will the new guidelines retain the current requirements that the Department "must refrain from any conduct which has the possibility of affecting the election itself," and that "most, if not all, investigation of an alleged election crime must await the end of the election to which the allegation relates"? If not, why not?**

Answer: The Department's noninterference guidelines with respect to the election process have not changed substantively. The text of the guidelines in the 2007 manual has been expanded to offer more explanation, assistance, and guidance developed from the Department's ongoing criminal enforcement efforts in the area of election and campaign finance crimes and the Public Integrity Section and its Election Crimes Branch's increased expertise in this difficult yet important area. The current guidelines are as follows:

> Noninterference with Elections
>
> The Justice Department's goals in the area of election crime are to prosecute those who violate federal criminal law and, through such prosecutions, to deter corruption of future elections. The Department does not have a role in determining which candidate won a particular election, or whether another election should be held because of the impact of the alleged fraud on the election. In most instances, these issues are for the candidates to litigate in the courts or to advocate before their legislative bodies or election boards. Although civil rights actions under 42 U.S.C. § 1983 may be brought by private citizens to redress election irregularities, the federal prosecutor has no role in such suits.
>
> In investigating an election fraud matter, federal law enforcement personnel should carefully evaluate whether an investigative step under consideration has

the potential to affect the election itself. Starting a public criminal investigation of alleged election fraud before the election to which the allegations pertain has been concluded runs the obvious risk of chilling legitimate voting and campaign activities. It also runs the significant risk of interjecting the investigation itself as an issue, both in the campaign and in the adjudication of any ensuing election contest.

Accordingly, overt criminal investigative measures should not ordinarily be taken in matters involving alleged fraud in the manner in which votes were cast or counted until the election in question has been concluded, its results certified, and all recounts and election contests concluded. Not only does such investigative restraint avoid interjecting the federal government into election campaigns, the voting process, and the adjudication of ensuing recounts and election contest litigation, but it also ensures that evidence developed during any election litigation is available to investigators, thereby minimizing the need to duplicate investigative efforts. Many election fraud issues are developed to the standards of factual predication for a federal criminal investigation during post-election litigation.

The Department views any voter interviews in the pre-election and balloting periods, other than interviews of a complainant and any witnesses he or she may identify, as beyond a preliminary investigation. A United States Attorney's Office considering such interviews must therefore first consult with the Public Integrity Section. USAM 9-85.210. This consultation is also necessary before any investigation is undertaken near the polls while voting is in progress.

The policy discussed above does not apply to covert investigative techniques, nor does it apply to investigations or prosecutions of federal crimes other than those that focus on the manner in which votes were cast or counted. However, if there is any doubt about whether the policy may apply, we recommend that the Public Integrity Section be consulted.

Exceptions to this general rule of course exist. For example, one exception may be appropriate when undercover techniques are justified and the Department's guidelines for undercover operations have been met. Another exception may apply when it is possible to both complete an investigation and file criminal charges against an offender prior to the period immediately before an election. All such exceptions require consultation with the Public Integrity Section, as they involve action beyond a preliminary investigation.

Federal Prosecution of Election Offenses (Seventh Edition, May 2007), U.S. Department of Justice, Criminal Division, Public Integrity Section, pp. 91-93; see also *Federal Prosecution of Election Offenses* (Sixth Edition, January 1995) , U.S. Department of Justice, Criminal Division, Public Integrity Section, pp. 60-61.

Questions Posed by Senator Durbin:

1. **A June 21, 2007 front page article in the *Washington Post* paints a troubling picture of the treatment of career attorneys in the Civil Rights Division's Appellate Section. According to this article, your predecessor, Bradley Schlozman, involuntarily transferred three female minority attorneys out of the Division's Appellate Section because he wanted to make room for "good Americans."**

   And at a June 5, 2007 hearing before this Committee, Mr. Schlozman admitted that he boasted of hiring conservatives and Republicans into the Division. The *Washington Post* article also indicates Mr. Schlozman ordered that cases be taken away from certain attorneys in the Appellate Section whom he believed were not "on our team," and the article says Mr. Schlozman, upon learning that an attorney in that section had voted for John McCain rather than George Bush, asked "Can we still trust her?"

   a. **How do you reconcile Mr. Schlozman's comments and actions with your statement in a written answer submitted to this committee on April 11, 2007 that "there is no political litmus test used in deciding to hire attorneys in the Civil Rights Division"?**

   b. **Is there, or has there been, a political litmus test used in deciding to involuntarily transfer or give work assignments to attorneys in the Civil Rights Division?**

Answer: AAG Kim testified that his hiring practices for career attorney positions in the Civil Rights Division is to measure whether candidates have a demonstrated record of excellence, whether they are talented attorneys consistent with that excellent record and whether they share a commitment to the work of the Division. The Division hires outstanding attorneys from an extremely wide variety of backgrounds. AAG Kim did not employ a political litmus test in making personnel decisions for career attorneys. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of such matters, with which the Division is fully cooperating.

   c. **Have you yourself ever made comments along the lines of what Mr. Schlozman is reported to have said, or told anyone that you wanted to hire more conservatives and Republicans into the Civil Rights Division?**

Answer: While the question does not indicate the specific statements reportedly made, AAG Kim does not recall any statement indicating that he wanted to hire career attorneys based on their political affiliation, or in violation of any law, rule, or regulation. The record clearly reflects that AAG Kim was involved in hiring talented attorneys from a

wide variety of backgrounds.

d. Do you believe it is appropriate to express doubts about the trustworthiness of a Justice Department attorney based on whom they vote for in elections?

Answer: No.

e. Have you, or any management officials serving under you, involuntarily transferred or terminated any attorneys in the Civil Rights Division since you were confirmed in November 2005? If so, please explain why the transfer(s) were made.

Answer: Yes. The Civil Rights Division has substantial confidentiality interests in the deliberative process leading to such decisions. Consistent with AAG Kim's management style and historical practices, staffing decisions were made based on the talents and interests of an individual and the needs of the Department. In this process, AAG Kim placed great weight on the judgments of career section management.

f. Please provide a list of all Civil Rights Division employees who have been involuntarily transferred or terminated since January 2001, and provide an explanation as to why each transfer or termination took place.

Answer: Providing the names of these individuals would implicate their privacy interests. In addition, the Civil Rights Division has substantial confidentiality interests in the deliberative process that led to these decisions. Consistent with AAG Kim's management style and historical practices, staffing decisions were made based on the talents and interests of an individual and the needs of the Department. In this process, AAG Kim placed great weight on the judgments of career section management.

2. In a 2006 newsletter published by Regent University Law School, a 2004 graduate of the school, Bill Condon, discussed his experience in obtaining a job with the Civil Rights Division. Mr. Condon wrote: "During my third year in law school, God opened only one door to employment. That door was to the Civil Rights Division of the United States Department of Justice."

Mr. Condon discussed the hiring process, which consisted solely of an interview with two political appointees in the Civil Rights Division front office. Mr. Condon wrote that the interview was "intense" and stated: "They caught me a little off guard when they asked me with which Supreme Court decision in the last twenty years I most disagreed." Mr. Condon said he answered: *Lawrence v. Texas*, which struck down state laws that prohibited same-sex sexual relations. He wrote: "When one of the interviewers agreed and said that decision in *Lawrence* was 'maddening,' I knew I correctly

answered the question."

a. How do you reconcile Mr. Condon's statements with your statement in a written answer submitted to this committee on April 11, 2007 that "there is no political litmus test used in deciding to hire attorneys in the Civil Rights Division"?

Answer: Asking a law school student to name and discuss a Supreme Court decision is a fair way to measure the applicant's (1) interest in and knowledge of current Supreme Court decisions, (2) critical legal thinking skills, and (3) ability to articulate a sound legal or factual viewpoint. To be clear, there is no "correct" or "incorrect" answer to such an open-ended question. It is designed to elicit a response from the applicant that he or she must then legally explain and defend, regardless of which court decision they chose.

This question, of course, is only one of many possible questions that may be asked of an attorney applicant, and any answer is only a part of the evaluation of an applicant. It is implausible for any applicant to believe that an answer to any single question would be the reason he or she was hired to work at the Department of Justice.

The Department is committed to not discriminating against an applicant for a career position based on political affiliation.

b. How do you reconcile Mr. Condon's statements with your statement in a written answer submitted to this committee on April 11, 2007 that "Section Chiefs play a central role in the hiring of attorneys through both the Honors Program and lateral hiring process, including active participation in interviewing both lateral and Honors Program applicants. I take very seriously the recommendations of Section Chiefs in all personnel matters"?

Answer: The statement is accurate. Since at least November 2005, Section Chiefs have been involved in hiring for vacancies in their respective sections as well as the Honors Program hiring process. Section Chiefs participate fully in these interview processes. Hiring decisions are made with input of both the career section chief and other Division leadership.

c. Do you think it is appropriate for political appointees to ask career attorney applicants which Supreme Court decisions they most disagree with? Is this a question that is frequently asked of applicants to the Civil Rights Division? Please explain.

Answer: See response to subpart a, above.

d. Please identify the names of the political appointees who interviewed Mr. Condon, and indicate whether they are still employed in the Civil

Rights Division and still involved in hiring career attorneys.

Answer: The Division does not systematically track this information. Based on his date of entry into the Division, Mr. Condon was interviewed, we believe, in 2003. Most of those directly involved in the Honors Program interview process in 2003 no longer work in the Division or even the Department.

e. How many career attorneys have been hired in the Civil Rights Division since January 2001 after being interviewed only by political appointees or front office officials?

Answer: The Division does not systematically track the persons who interview applicants for attorney positions. However, in accordance with my policy set forth in response to subpart b, since November 2005 we are not aware of any career attorneys have been hired to work in the Civil Rights Division after being interviewed only by political appointees.

3. Joseph Rich, the chief of the Voting Section until 2005, testified at the November 2006 Civil Rights Division oversight hearing that there were instances in which attorneys were hired into his section without his participation. He testified: "There was also an occasion when, without prior consultation, I was informed of the hiring of a new attorney who would be arriving in the office in a matter of days. Similarly, without prior consultation with me and without the normal process of advertising for supervisory positions, I was informed of the appointment of a special counsel to the section only a few days before his arrival in the section."

How do you reconcile Mr. Rich's testimony with your statement in a written answer submitted to this committee on April 11, 2007 that "Section Chiefs play a central role in the hiring of attorneys through both the Honors Program and lateral hiring process, including active participation in interviewing both lateral and Honors Program applicants. I take very seriously the recommendations of Section Chiefs in all personnel matters"?

Answer: AAG Kim's statement about the role of Section Chiefs in hiring and personnel decisions was an accurate description of his management style. The Division's career Section Chiefs play a central role in the hiring of attorneys through both the Honors Program and lateral hiring process, including active participation in interviewing both lateral and Honors Program applicants. AAG Kim took very seriously the recommendations of Section Chiefs in all personnel matters.

Assistant Attorney General Kim did not supervise the Voting Section during Mr. Rich's tenure there.

4. You submitted data to the Committee on April 11, 2007 regarding the

number of attorneys in the Civil Rights Division over the past 13 years. The data indicate there has been an 8% decline in the number of attorneys working in the Division since 2005. There were 346 attorneys in 2005 and only 319 in 2007.

Please explain the 8% decline in the number of attorneys working in the Civil Rights Division between 2005 and 2007. Do you intend to hire additional attorneys to return to the high-water mark of 349 attorneys that worked in the Division in 2004? If not, please provide an explanation. If so, when do you expect to reach the 349 mark again?

Answer: Between 2005 and 2007, consistent with the authorization by Congress and reprogramming by the Department, funding for 13 attorney positions in the Civil Rights Division was transferred to the U.S. Attorney's Offices. At the present time, Congress has authorized funding for 324 attorneys in the Civil Rights Division. The Division has internally reallocated within this budget to reduce the number of non-attorney positions and create additional attorney positions. As of AAG Kim's departure in August 2007, the Civil Rights Division had 321 attorneys on board and was in the process of hiring 18 additional attorneys.

5. **Professor Helen Norton's testimony is a stinging critique of the Bush Administration's efforts to enforce our nation's most important anti-discrimination law, Title VII. She discussed how few employment discrimination cases have been brought by this Administration on behalf of African Americans, Hispanics, and women, compared to the Clinton Administration. Even though you have 10-20% more attorneys in the Employment Litigation Section than the previous Administration had, you have brought about half the number of employment discrimination cases that they did.**

Professor Norton also discussed the two significant Supreme Court cases over the past year in which the Justice Department filed amicus briefs that took positions designed to diminish the rights of discrimination victims. Remarkably, in both of these cases the Justice Department fought against the pro-victim position was advocated by President Bush's own EEOC.

Do you dispute any of the data or facts set forth in Professor Norton's testimony? If so, please explain. If not, why has this Administration shown such a lack of commitment to Title VII enforcement?

Answer: The Civil Rights Division remains diligent in combating employment discrimination on behalf of all Americans, one of the Division's most long-standing obligations. Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those

claims are investigated and potentially litigated by the Equal Employment Opportunity Commission ("EEOC"). However, the Civil Rights Division's Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers.

Pursuant to Section 707 of Title VII, the Attorney General has authority to bring suit against a State or local government employer where there is reason to believe that a "pattern or practice" of discrimination exists. These cases are factually and legally complex, as well as time-consuming and resource-intensive. In Fiscal Year 2006, we filed three complaints alleging a pattern or practice of employment discrimination – as many as filed during the last three years of the previous Administration combined.

One recent case highlights our efforts. In *United States v. City of New York*, filed on May 21, 2007, the Division alleged that since 1999, the City of New York has engaged in a pattern or practice of discrimination against black and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York ("FDNY") in violation of Title VII. Specifically, the complaint alleges that the City's use of two written examinations as pass/fail screening devices and the City's rank-order processing of applicants from its firefighter eligibility lists based on applicants' scores on the written examinations (in combination with scores on a physical performance test) have resulted in disparate impact against black and Hispanic applicants and are not job related and consistent with business necessity. The complaint was filed pursuant to Sections 706 and 707 of Title VII, and was expanded to include discrimination against Hispanics as a result of the Division's investigation.

In *United States v. City of Virginia Beach* and *United States v. City of Chesapeake*, the Division alleged that the cities had violated Section 707 by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. In *Virginia Beach*, the parties reached a consent decree providing that the city will use the test as one component of its written examination and not as a separate pass/fail screening mechanism with its own cutoff score. On June 15, 2007, the court provisionally entered a consent decree in the *City of Chesapeake* litigation. Under the decree, the City will create a fund to provide back pay to African-American and Hispanic applicants who were denied employment solely because of the City's use of a math test as a pass/fail screening device. The City also will provide priority job offers for African-American and Hispanic applicants who are currently qualified for the entry-level police officer job but were screened out solely because of their performance on the math test. The City will provide retroactive seniority to such hires when they complete the training academy. In addition, the City agreed that, while it will still use scores on the mathematics test in combination with applicants' scores on other tests, it will not prospectively use the mathematics test as a stand alone pass/fail screening device.

The Division also has enforcement responsibility for the Uniformed Service Employment and Reemployment Rights Act of 1994 ("USERRA"). USERRA was enacted to protect

veterans of the armed services when they seek to resume the job they left to serve their country. USERRA enables those who serve their country to return to their civilian positions with the seniority, status, rate of pay, health benefits, and pension benefits they would have received if they had worked continuously for their employer. In Fiscal Year 2006, the Division filed four USERRA complaints in Federal district court and resolved six cases.

During Fiscal Year 2006, we filed the first USERRA class action complaint ever filed by the United States. The original class action complaint, which was filed on behalf of the individual plaintiffs we represent, charges that American Airlines ("AA") violated USERRA by denying three pilots and a putative class of other pilots employment benefits during their military service. Specifically, the complaint alleges that AA conducted an audit of the leave taken for military service by AA pilots in 2001 and, based on the results of the audit, reduced the employment benefits of its pilots who had taken military leave, while not reducing the same benefits of its pilots who had taken similar types of non-military leave. Other examples of recent USERRA suits include *Richard White v. S.O.G. Specialty Knives*, in which a reservist's employer terminated him on the very day that the reservist gave notice of being called to active duty. We resolved this case through a consent decree that resulted in a monetary payment to the reservist. In *McCullough v. City of Independence, Missouri*, the Division filed suit on behalf of Wesley McCullough, whose employer allegedly disciplined him for failing to submit "written" orders to obtain military leave. We entered into a consent decree in which the employer agreed to rescind the discipline and provide Mr. McCullough payment for the time he was suspended. The employer also agreed to amend its policies to allow for verbal notice of military service.

In Fiscal Year 2007 thus far, we have filed 5 USERRA complaints in district court and resolved 5 cases. Additionally, the United States Attorney's offices have resolved three cases this fiscal year. One of these cases we have resolved in the current fiscal year is *McKeage v. Town of Stewartstown, NH*. In that case, the town sent Staff Sergeant Brendon McKeage a letter while he was on active duty in Iraq telling him he no longer had his job with the town. McKeage had been employed as the Chief of Police for the Town of Stewartstown. When the citizens of Stewartstown learned that their Chief of Police had been terminated while serving his country, they voted to censure the Town for its "outrageous and illegal" conduct. Despite this public censure, the Town still refused to reemploy SSG McKeage in his former position. Once we notified Stewartstown that we intended to sue, the employer decided to settle the case. The settlement terms include a payment to SSG McKeage of $25,000 in back wages.

The Division has proactively sought to provide information to members of the military about their rights under USERRA and other laws. For example, we recently launched a website for service members (www.servicemembers.gov) explaining their rights under USERRA, the Uniformed and Overseas Citizen Absentee Voting Act ("UOCAVA"), and the Servicemembers' Civil Relief Act ("SCRA").

The United States filed briefs with the Supreme Court as amicus curiae in *Burlington Northern and Santa Fe Railway Co.* v. *White* and *Ledbetter* v. *Goodyear*. In the amicus brief that it filed in *Burlington Northern*, the United States argued that the term "discriminate" in Title VII's anti-retaliation provision must be read consistently with the statute's core anti-discrimination provision, which prohibits discrimination on the basis of race, color, sex, national origin, or religion. In the amicus brief that it filed in *Ledbetter*, the United States argued that Supreme Court precedent forecloses Title VII claims that are based on the theory that paychecks issued in the limitations period perpetuate time-barred acts of discrimination. As discussed more fully in both of its amicus briefs, the United States determined that these positions were the correct interpretation after a careful review of Title VII and the case law interpreting it.

The Supreme Court agreed with the position of the United States in *Ledbetter*. The Supreme Court agreed with the result advocated by the United States in *Burlington Northern*, although the Court adopted a different rationale. The Department acknowledges and accepts the Supreme Court's decisions in both cases, and, as with all decisions of the Supreme Court, will follow the Court's precedent.

A copy of the United States' amicus briefs, which set forth fully its positions in these cases, may be found at: http://www.usdoj.gov/osg/briefs/2005/3mer/1ami/2005-0259.mer.ami.html (*Burlington Northern*) and http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-1074.mer.ami.html (*Ledbetter*).

6. In his testimony, Wade Henderson stated: "The Voting Section did not file any cases on behalf of African American voters during a five-year period between 2001 and 2006 and no cases have been brought on behalf of Native American voters for the entire administration."

When you came before this Committee for your nomination hearing in October 2005, I asked you why the Justice Department hadn't filed a single Section 2 voting rights case on behalf of African Americans other than one previously authorized by the Clinton Administration. You said at that time that you hadn't worked on voting issues and did not know the answer. I would like to pose the same question now, a year and a half later.

a. Other than one Section 2 case that had been previously authorized by the Clinton Administration, why did the Justice Department file no Section 2 complaints to vindicate the voting rights of African Americans until July 2006?

b. What role did Hans von Spakovsky and Bradley Schlozman – both of whom had left the Civil Rights Division by July 2006 – play in the failure to bring Section 2 lawsuits on behalf of African Americans?

Answer: In this Administration, the Voting Section of the Civil Rights Division has filed cases on behalf of African American voters in many jurisdictions, including: *United States* v. *Crockett County* (W.D. Tenn.); *United States* v. *Euclid* (N.D. Ohio); *United States* v. *Miami-Dade County* (S.D. Fla.); and *United States* v. *North Harris Montgomery Community College District* (S.D. Tex), which also involved protecting the rights of Hispanic citizens. We also successfully litigated *United States* v. *Charleston County, South Carolina* (D.S.C.) and successfully defended that victory before the Fourth Circuit. The Department continues to seek out and prosecute cases on behalf of African-American citizens.

The Department, of course, vigorously enforces all of the provisions of the Voting Rights Act. During calendar year 2006, the Voting Section filed 18 new lawsuits, which is double the average number of lawsuits filed in the preceding 30 years. During this Administration, moreover, we have filed two thirds of all cases ever filed under the minority language provisions of the Voting Rights Act, as well as approximately 75 percent of all cases ever filed under Section 208. We also have used Section 2 of the Voting Rights Act to challenge barriers to participation, as in *United States* v. *Long County* (S.D. Ga.) and *United States* v. *City of Boston* (D. Mass.). We have filed the first voting rights case in the Division's history on behalf of Haitian Americans; the first voting rights case in the Division's history on behalf of Filipino Americans; the first voting rights case in the Division's history on behalf of Korean Americans; and the first voting rights cases in the Division's history on behalf of Vietnamese Americans. Finally, the Department continues to vigorously defend the reauthorization of Voting Rights Act against a constitutional challenge. We will continue vigorously to protect all Americans from unlawful discrimination in voting.

7. **At the June 21, 2007 hearing, Senator Whitehouse asked you if you are familiar with the concept of "caging" as a voter suppression strategy. You testified that you were. According to a June 25, 2007 *McClatchy* article, your predecessor, Alexander Acosta, signed a letter to a federal judge in Cincinnati four days before the November 2004 election in which he defended Ohio Republican Party efforts to challenge the credentials of 23,000 voters, most of whom were African-American.**

   a. **Do you think it was appropriate for Mr. Acosta to send this letter to the federal court four days before the November 2004 election? Please explain.**

Answer: On October 29, 2004, the Department of Justice filed a three paragraph letter brief, in lieu of a longer pleading, in the matter of *Spencer v. Blackwell*, Case No. 04CV738. This letter brief was properly filed with the court, with notice to parties. It is proper for the Department of Justice to present its views to courts regarding the application, interpretation, or enforcement of Federal law, as it did in this case.

   b. **What role did Hans von Spakovsky play in drafting this letter?**

Answer: The Department has substantial confidentiality interests in our deliberative process relating to these matters.

c. The former chief of the Voting Section, Joseph Rich, said he believed Mr. Acosta's letter constituted an act of "caging." Do you agree? Please explain.

Answer: Please see the response to subpart a above.

8. In your April 11, 2007, you indicated the Civil Rights Division's Criminal Section had three matters related to the November 7, 2006 election under investigation, and you briefly identified the facts regarding each investigation.

What is the status of each of these investigations?

Answer: The investigations regarding the cross burning in Grand Coteau, Louisiana, and the mailing of misleading letters in Orange County, California, are continuing. With regard to the Orange County mailing, the California Attorney General's Office also investigated the matter but determined that there was insufficient evidence to bring a prosecution. The investigation into the presence of armed men at the polls in Pima County, Arizona, did not produce evidence sufficient to prove a violation of Federal criminal laws beyond a reasonable doubt. The matter has been referred to the Voting Section of the Civil Rights Division for further investigation and assessment. We are prepared to take any legal action that the facts and the law warrant.

9. In his testimony, Wade Henderson stated that the Justice Department announced a new policy in 2003 that it would no longer file disparate impact cases involving housing discrimination. These high impact cases are crucial in effectively combating housing discrimination, and they had been pursued by DOJ for decades.

Why was this change in policy made? Is this policy still in effect?

Answer: There was no announcement of a new policy. The Housing and Civil Enforcement Section considers and relies upon evidence of "disparate impact" in applicable cases. We are not aware that the Section has ever filed a case based solely upon a "disparate impact" theory.

10. On June 28, 2007, the Supreme Court issued an opinion striking down the use of race by the Seattle, Washington and Jefferson County, Kentucky school systems.

What impact will this decision have on the work of the Civil Rights Division's

Educational Opportunities Section? Please provide any written analysis about the decision that has been generated within the Division.

Answer: The Department respects the decisions of the Supreme Court and will faithfully apply its rulings. The plurality opinion expressly recognizes that a school district has a compelling interest in remedying the effects of past intentional discrimination, which is consistent with the longstanding work of the Civil Rights Division's Educational Opportunities Section in enforcing Title IV of the Civil Rights Act. It is premature to determine what impact, if any, this decision will have on that work.

11. Your April 11, 2007 response to the Senate Judiciary Committee did not contain a direct response to the following questions I asked you: "Why did the Justice Department bring over three times as many sex trafficking cases as labor trafficking cases? Does the Department receive over three times as many sex trafficking allegations as labor trafficking allegations"?

Please provide a direct, responsive answer to these questions.

Answer: The Division prosecutes trafficking cases without regard to whether they are labor or sex trafficking cases. We do not treat the cases differently based on whether the underlying allegations are sex or labor trafficking. Nor do we prioritize one type of case over another. We do not track incoming matters based on whether they allege sex or labor trafficking.

12. Political appointees in the Civil Rights Division front office have reportedly asserted their authority to handle numerous oral arguments before federal courts of appeal. Many of these individuals had far less oral argument experience than career attorneys in the Division's Appellate Section, who traditionally have handled oral arguments on behalf of the Division.

Please list all cases since January 2001 in which an oral argument was handled by a member of the Civil Rights Division front office, including the name of the individual who argued the case and a brief summary of the case.

Answer: The Division does not systematically track this information. However, please see the attached list of the cases that have been argued by attorneys who are currently in the Office of the Assistant Attorney General, including the Special Counsel for Religious Discrimination, who is a career attorney in the Office of the Assistant Attorney General.

13. You indicated in your April 11, 2007 answers that the Civil Rights Division's Appellate Section continued to file briefs defending decisions of the U.S. government to deport illegal immigrants.

a. In the first half of FY 2007, what percent of the briefs filed by the Appellate Section involved such cases?

b. In the first half of FY 2007, what percent of the attorney hours in the Appellate Section were spent working on such cases?

Answer: As of June 30, 2007, there were eight Civil Rights Division attorneys (two in the Appellate Section, two in the Disability Rights Section, one in the Housing and Civil Enforcement Section, one in the Voting Section, one in the Employment Litigation Section, and one in the Educational Opportunities Section) actively working on an OIL case. The vast majority of OIL cases are awaiting scheduling of oral argument, are under submission, or have been decided. From October 1, 2006 to March 31, 2007, the Appellate Section filed 35 briefs, 19, or 54%, of which were on behalf of OIL.

The percentages of total attorney hours per section spent on all OIL cases handled within the Civil Rights Division, dating from October 1, 2006, to March 31, 2007, are approximately as follows:

Section	% of Time Spent on OIL Cases
Appellate	19
Coordination & Review	.04
Criminal	.88
Disability Rights	2.38
Educational Opportunities	1.84
Employment Litigation	3.6
Housing and Civil Enforcement	2.81
Special Litigation	2.17
Voting	.67

The Department will not shirk from its responsibility to enforce the immigration laws passed by Congress. Until OIL has sufficient staff to manage the overwhelming workload, the Department must continue to share this responsibility. The Department is seeking to augment staffing and resource levels such that OIL ultimately will have sufficient staff to assume responsibility for all cases, including the Second Circuit cases formerly handled by SDNY.

14. In your April 11, 2007 submission to the Senate Judiciary Committee, you refused to answer several of the written questions that I and other members of this committee asked you following your November 2006 oversight hearing, stating that the Department has a policy against the disclosure of "internal deliberations." Yet the Department of Justice has turned over

thousands of internal deliberative documents in connection with the U.S. Attorney investigation.

Why is the Department of Justice willing to turn over such information regarding the U.S. Attorney investigation but unwilling to do so regarding Civil Rights Division enforcement?

Answer: The Department consistently seeks to accommodate requests from Congress in a way that satisfies both the Committee's oversight needs and the Department's interests in confidentiality. The Department has a general and longstanding policy against disclosing internal deliberations that would chill the free flow of information from the Department's career attorneys and would chill the robust internal debate involved in the decision making process. However, we seek to cooperate with Congressional requests as fully as possible, including the extraordinary and virtually unprecedented step of disclosing internal and deliberative materials in connection with the U.S. Attorney investigation.

Questions Posed by Senator Schumer:

1. **Protecting the Right to Vote**

The right to vote is perhaps our most fundamental civil right, the wellspring of our democracy. Unfortunately, recent elections have been marred by many instances of misleading, threatening, and malevolent behavior that should have no place in our democracy. Much of this bad conduct is not currently barred by federal law.

In January, with Senator Obama, I introduced a bill in the Senate (S. 453) that would criminalize the communication of false information with the intent to prevent another person from voting.

a. As the head of one of the Justice Department divisions with substantial responsibility for safeguarding civil rights, do you agree that there is a need for legislation to address certain election-related deceptive practices that current Federal statutes do not reach?

Answer: The Department's views on the substitute to S. 453 are set forth in the attached letter, which was sent to the Senate in October of 2007.

b. The Obama-Schumer bill would also amend 18 U.S.C. § 594 to increase the maximum penalty for voter intimidation to five years of imprisonment. Given the severity of this crime and the fact that it touches on one of our most cherished civil rights, do you agree that the maximum penalty for voter intimidation, which is currently just one year of imprisonment, should be increased to deter and punish this very serious crime?

Answer: Yes. As we state in our attached views letter on the substitute to S. 453, we agree that voter intimidation is a serious crime, and we support this amendment. The bill's increase in the maximum penalty for 18 U.S.C. § 594 is particularly appropriate because Section 594's penalty would then match the five-year penalty in the other Federal criminal statute addressing voter intimidation, 42 U.S.C. 1973gg-10(1), which was enacted as part of the National Voter Registration Act of 1993.

2. **Civil Rights Division Hiring**

During your testimony on June 21, 2007, you confirmed that "there is an ongoing and active investigation by both the Office of Professional Responsibility and the Office of the Inspector General" into whether political considerations were taken into account in hiring decisions by the Department of Justice's Civil Rights Division.

a. What specific actions, if any, are you taking to ensure that all employees of the Civil Rights Division cooperate fully with this investigation?

Answer: The staff in the Office of the Assistant Attorney General and in each component Section of the Division has been instructed to provide any information requested by the investigators. We have been in contact with the investigators to make sure that their requests are being honored.

b. What specific actions, if any, will you take to ensure that any negative findings of this investigation are addressed through improvements in hiring practices? Can you pledge to this Committee that you will respond to any negative findings with concrete improvements?

Answer: On June 29, 2007, AAG Kim issued a Memorandum of Guidance on Personnel Matters (the June 29 Memorandum), a copy of which is attached. The Department also included a copy of the June 29 Memorandum as an attachment to its letter of July 3, 2007, to Chairman Leahy. The June 29 Memorandum reminds all Division attorneys "that the Department of Justice is an Equal Opportunity/Reasonable Accommodation Employer." It further makes clear that "[c]onsistent with applicable law, Department policies and my own practice, there will be no discrimination based on color, race, religion, national origin, political affiliation, marital status, disability, age, sex, sexual orientation, status as a parent, membership or non-membership in an employee organization, or personal favoritism."

Although it is not possible to offer any specific response to speculations about any future findings of the Office of Professional Responsibility and Office of the Inspector General, the Division is committed to review any recommendations and take whatever appropriate actions may be required.

You also stated in your testimony that you "will abide as closely as possible [by] the rules of the road" when making hiring decisions.

c. Is the Department's policy against considering political and ideological affiliations in hiring a formal policy, or is it merely informal? If it is a formal policy, please provide the Committee with the pertinent policy documents.

Answer: See the attached June 29 Memorandum and sources cited therein.

d. Given the allegations that are now under investigation, what actions, if any, are you taking to make your hiring practices more transparent and less susceptible to inappropriate political considerations?

Answer: In addition to the attached memorandum, there are several practices in place that foster transparency and fairness in the Division's hiring practices. Since at least November 2005, for example, Section Chiefs review the resumes of all applicants for lateral attorney vacancies in their respective sections, and recommend candidates for interviews. The Section Chiefs participate fully in the interview process. Hiring decisions are made with input of both the career Section Chief and other Division leadership.

e. What steps, if any, are you taking to make other personnel decisions, such as transfers and case assignments, more transparent and less susceptible to inappropriate political considerations?

Answer: The Division offers employees an "open season" in which they are eligible to transfer to another section subject to the approval of the affected career section chiefs. As expressed in the June 29 Memorandum, the Division's commitment to fairness in personnel matters includes, but is not limited to, "appointments, promotions, reassignments, details, pay, awards, and adverse actions."

Shortly after confirmation, AAG Kim created the position of Ombudsman within the Office of the Assistant Attorney General so that all Division staff will have a person to contact (in addition to the Division's Human Resources Office) to express any complaints of unfair treatment. All Division employees were notified that the highest levels of Division management were available to personally address any concerns that they may have. (See June 29 Memorandum.)

Under President Bush, the Justice Department put political appointees in charge of hiring for the Attorney General's honors program and summer intern hiring. This decision was widely criticized for creating an opportunity for partisanship to infect the hiring process. In April, the Justice Department abandoned this experiment and put career employees back in charge of the hiring program.

f. [Omitted]

g. Who made the decision to take the hiring process away from political appointees and give it back to career employees?

h. Why was that decision made?

Answer: The Attorney General's Honors Program ("HP") is one of the most prestigious and competitive hiring programs in the country. It is administered and promoted by the Office of Attorney Recruitment and Management ("OARM"). This is a career office with administrative oversight of all career attorneys within the Department. OARM manages the applications and conducts the initial screening process to make certain that all applicants are eligible for participation in the HP. Applicants are then referred to

components (such as the Civil Rights Division) based on the applicant's stated preference. The applications are reviewed by each component. This review typically includes the input of both career and political appointees. In the Civil Rights Division, applicants are interviewed by both career employees and political appointees and hiring recommendations are made to the Assistant Attorney General.

In 2002, the Attorney General's Honors Program was revised to modernize the application process to be E-government compliant and to open the program to the broadest possible pool of interested applicants. The changes converted recruitment materials from print to web-based formats; allowed applicants to submit their applications online and track their status as hiring decisions were made; and streamlined automation to achieve an earlier extension of offers and acceptances. Additionally, rather than sending teams of interviewers out to 14 separate locations around the country, the Department brought candidates to Washington so they could see the Department first hand. A Departmental level review was also added in 2002 to meet budget requirements and assure the high quality standards suitable for an Honors program.

On April 26, 2007, the Justice Department issued new guidelines with respect to the hiring process for the Attorney General's Honors Program. (Please see the attached new guidelines.) The new guidelines remove any political appointees from the Attorney General's office, Deputy Attorney General's office, or Associate Attorney General's office from participation in this hiring process. Under the guidelines, the hiring process is now delegated to the individual DOJ components and to a working group that is comprised of career employees from OARM and representatives from the various DOJ components. Among other things, the purpose of these changes was to avoid even the perception of any political influence in the process, provide greater transparency to the programs, and facilitate the goals of assuring the selection of highly qualified candidates from the broadest applicant pool possible. It is important to note that career attorneys have always and continue to participate in the selection process for these programs.

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20035*

November 2, 2004

VIA FACSIMILE

Honorable Sidney H. Cates IV
Parish of Orleans
Civil District Court
421 Loyola Avenue, Room 200-C
New Orleans, LA 70112

Dear Judge Cates:

We understand that a lawsuit has been filed in your court seeking to extend the hours that the polls shall remain open in your parish. The Department of Justice has responsibility for enforcement of the Help America Vote Act of 2002 (HAVA). While HAVA does not require extending the hours that polls are normally open according to state law, we write to ensure that you are aware of Section 302(c) of HAVA, 42 U.S.C. 15482(c), which provides:

> Voters Who Vote After the Polls are Closed: Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot under subsection (a). Any such ballot cast under the preceding sentence shall be separated and held apart from the other provisional ballots cast by those not affected by the order.

If you have any questions about this provision, you may contact me at 202-532-5610

Sincerely,

Sheldon T. Bradshaw
Principal Deputy Assistant Attorney General

Donovan v. Punxsutawney Area School Board (Third Circuit) (argued May 14, 2003, by Special Counsel for Religious Discrimination Eric Treene)

Plaintiff Melissa Donovan, a student at Punxsutawney High School and leader of FISH, a student Bible club, brought suit under the First Amendment, Fourteenth Amendment, 42 U.S.C. 1983, and the Equal Access Act (EAA), 20 U.S.C. 4071-4074, based on the school board's policy that religiously-oriented student groups could not meet during the high school's activity period. The Division filed an amicus brief on behalf of Donovan. On July 15, 2003, the Third Circuit reversed the district court's denial of a preliminary injunction and final order denying all relief. The court held that the school's activity period, during which "noncurriculum related groups" such as the ski club and an anti-drug and -alcohol club were permitted to meet, constitutes "noninstructional time" for purposes of the EAA. Consequently, the EAA makes it unlawful for the school board to deny FISH equal access to hold meetings during the activity period based on the religious nature of the club. Acknowledging that the parties agreed that the activity period constituted a limited public forum for purposes of First Amendment analysis, the court held that denying FISH the opportunity to meet because of the group's religious perspective constituted unconstitutional viewpoint discrimination and that the school had no valid Establishment Clause interest that could justify such a violation.

Child Evangelism Fellowship v. Stafford Township School District (Third Circuit) (argued September 11, 2003, by Special Counsel for Religious Discrimination Eric Treene)

Plaintiff Child Evangelism Fellowship (CEF), a non-profit Christian organization, sought to hang promotional posters on school walls; participate in Back-to-School-Night programs; and have teachers distribute promotional flyers/permission slips at the end of the school day, in the same manner as other community organizations. The district court granted CEF a preliminary injunction; Stafford appealed. The Division filed a brief on behalf of CEF, arguing that barring CEF's efforts to promote its after-school activities was impermissible viewpoint discrimination and that permitting CEF to promote its after-school activities would not violate the Establishment Clause. On October 15, 2004, the Third Circuit affirmed the district court's grant of a preliminary injunction. The court rejected Stafford's arguments that the speech at issue in this case was school-sponsored; that Stafford had created "closed" fora that permitted it to exclude CEF's speech; and that excluding CEF's speech was necessary to avoid an Establishment Clause violation. The court held that Stafford engaged in viewpoint discrimination that was not justified by an effort to avoid an Establishment Clause violation. The court reasoned that by permitting CEF's speech, Stafford does not endorse or promote religion and does not coerce anyone to participate in religious activities. The court remanded the case to the district court for entry of permanent injunctive relief.

United States v. Bailey (First Circuit) (argued September 14, 2004, by then Deputy Assistant Attorney General Wan J. Kim)

The defendant, a former guard at the Nashua Street Jail in Boston, was convicted of violating 18 U.S.C. 242 by assaulting (and aiding and abetting the assault of) a pretrial detainee at the jail, thereby depriving him of his civil rights; of obstructing and conspiring to obstruct a federal criminal investigation, in violation of 18 U.S.C. 1512(b)(3); and of perjury, in violation of 18 U.S.C. 1623, for lying to a federal grand jury. He was sentenced to 41 months in prison. On May 3, 2005, the First Circuit affirmed defendant's conviction and sentence. In rejecting each of the defendant's arguments, the First Circuit held: (1) an obstruction of justice conviction under Section 1512(b)(3) does not require proof that a federal investigation was extant or imminent at the time of the misleading conduct; (2) the jury instructions on aiding and abetting were not plain error; (3) the evidence was sufficient to support the jury's finding that the victim sustained bodily injury; (4) a conspiracy charge, on which Bailey and his co-defendants were tried but ultimately acquitted, did not have a prejudicial spillover effect on the other counts; (5) the evidence supported the district court's finding that the victim, who was on suicide watch at the time of the assault, was unusually vulnerable for purposes of United States Sentencing Guidelines § 3A1.1(b)(1); and (6) the defendant failed to establish, under a plain-error standard, that he is entitled to resentencing under *United States* v. *Booker*, 125 S. Ct. 738 (2005), because he failed to show a reasonable probability that the district court would impose a more lenient sentence if the Sentencing Guidelines were treated as mercly advisory.

Saints Constantine & Helen Greek Orthodox Church v. City of Berlin (Seventh Circuit) (argued November 2, 2004, by Special Counsel for Religious Discrimination Eric Treene)

Plaintiff Saints Constantine & Helen Greek Orthodox Church alleged that the City of New Berlin violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) by denying its application to rezone land to build a church. The parties filed cross-motions for summary judgment. The district court granted the City's motion, ruling that the City's actions did not impose a substantial burden on religious exercise and, therefore, did not violate RLUIPA. The Church appealed. The Division argued as amicus curiae in support of the Church that the district court's reading of *Civil Liberties for Urban Believers (CLUB)* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) – as holding that zoning restrictions do not impose a substantial burden on religious exercise if a church can locate elsewhere in the city – is overbroad. On February 1, 2005, the Seventh Circuit reversed, holding that the district court erred in interpreting *CLUB* and that the City's denial placed a substantial burden on the Church. Because there were no disputed facts, the Court remanded with instructions to grant the Church its requested relief, with a stay of 90 days to allow the City and Church to negotiate a restriction limiting the parcel to use as a church.

Guru Nanak Sikh Society v. County of Sutter (Ninth Circuit) (argued October 17, 2005, by Special Counsel for Religious Discrimination Eric Treene)

Plaintiff Guru Nanak Sikh Society, a Sikh religious organization, brought suit under the Religious Land Use and Institutionalized Persons Act (RLUIPA) after Sutter County

denied its application for a use permit to build a temple on its land. The district court granted summary judgment to the plaintiff on its claim under Section 2(a)(1) of RLUIPA, finding that the County's denial of a use permit imposed a substantial burden on the plaintiff's religious exercise and was not the least restrictive means of advancing a compelling government interest. In its summary judgment ruling, the district court also upheld the constitutionality of RLUIPA, which the defendants had challenged. The Division filed a brief as intervenor and amicus curiae, defending the constitutionality of RLUIPA and supporting the merits of the plaintiff's RLUIPA claim. On August 1, 2006, the Ninth Circuit affirmed the district court's decision, agreeing with the United States that the relevant section of RLUIPA is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment. The court also found that the defendants' denial of the plaintiff's application for a special use permit imposed a substantial burden on the plaintiff's religious exercise in violation of RLUIPA.

Barnes Wallace v. Boys Scouts of America (Ninth Circuit) (argued February 14, 2006, by Special Counsel for Religious Discrimination Eric Treene)

Plaintiffs-appellees, a same-sex couple, an agnostic couple, and their minor Scouting-age sons, sued the City of San Diego and the Boy Scouts of America (BSA) over the City's long-term, low-cost leases of two parcels of public parkland to the BSA. One of the leases involves parkland on which the BSA has built its regional headquarters, as well as campgrounds and recreational facilities for use by the general public. The second involves parkland on which the BSA has built a youth aquatic center for use by the general public. Plaintiffs claimed that the leases violate the Establishment Clause, the Equal Protection Clause, and parallel provisions of the state constitution, by endorsing the BSA's discriminatory membership policies. The district court granted summary judgment in favor of plaintiffs on their Establishment Clause claims, and denied as moot their Equal Protection claims. BSA appealed, plaintiffs cross-appealed the denial of their Equal Protection claims, and the City settled with the plaintiffs. The Division argued as amicus in the court of appeals that the district court was incorrect as a threshold matter in finding that the Boy Scouts was a religious organization, such that the Establishment Clause applied to the City's leases with the Boy Scouts. The Division also argued that even if the Boy Scouts is a religious organization, the leases do not violate the Establishment Clause because they are not properly considered aid to a religious organization, or, if they are, such aid does not violate the Establishment Clause because it is made available to nonprofit organizations in a neutral manner, serves a secular purpose, and does not advance religion. Following oral argument, on December 18, 2006, the Ninth Circuit certified to the California Supreme Court three questions relating to the No Preference and No Aid Clauses of the California Constitution. Shortly after the certification order was issued, the Ninth Circuit indicated that en banc review of the order may be warranted and asked the California Supreme Court to delay consideration of the order until any necessary en banc review is concluded. Appellants' petitions for rehearing and rehearing en banc followed and are now pending.

Living Water Church of God v. Meridian Charter Township (Sixth Circuit) (argued September 9, 2006, by Deputy Assistant Attorney General Asheesh Agarwal)

Plaintiff Living Water Church of God sued Meridian Charter Township, alleging a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The district court held that the Township violated RLUIPA by denying Living Water a special use permit to construct a building in excess of 25,000 square feet. The court held that the denial of the permit imposed a substantial burden on the Church's religious exercise. The court enjoined the Township from preventing the Church from proceeding with the construction of a school and church building on its property, in conformity with its request for a special use permit. The Division argued as amicus that the Township violated Living Water's rights under RLUIPA by denying the Church the special use permit it had requested. The Division argued that denial of the permit operates as a substantial burden on Living Water's exercise of religion, because the Church cannot carry out all its ministries in a smaller building. The case is pending in the Sixth Circuit.

In re Grand Jury (United States v. John Doe) (Fourth Circuit) (argued November 30, 2006, by Deputy Assistant Attorney General Grace Chung Becker)

This case arose out of a federal grand jury investigation of an allegation that a police officer had used excessive force against a restrained arrestee. The grand jury subpoenaed from the police department statements that officers had made regarding this incident during an internal affairs investigation. The district court quashed the subpoena. The United States appealed, arguing that the district court abused it discretion in ruling that the city's interests in preserving the confidentiality of its investigations and protecting the Fifth Amendment rights of its officers outweighed the grand jury's interest in obtaining the subpoenaed statements. On February 22, 2007, the Fourth Circuit affirmed the district court's order quashing the subpoena. The court of appeals held that the district court did not abuse its discretion in concluding that the interests of the police department in keeping its investigation confidential and forestalling possible self-incrimination problems outweighed the grand jury's interest in obtaining these statements at this initial stage of its investigation. In so holding, the court of appeals noted that the grand jury could obtain this information by subpoenaing the interviewed officers directly and that counsel for the United States had conceded in the district court that it was unlikely that this investigation would result in a prosecution.

Colwell v. Department of Health & Human Services (Ninth Circuit) (argued February 13, 2007, by Deputy Assistant Attorney General Asheesh Agarwal)

The plaintiffs, individual physicians and two nonprofit organizations, filed suit challenging the Limited English Proficiency policy guidance issued by the Department of Health and Human Services (HHS) to implement Title VI of the Civil Rights Act of 1964 and its regulations. The policy guidance is intended to assist recipients of financial assistance from HHS in fulfilling their responsibilities under Title VI and its regulations to provide meaningful access to their programs to persons with limited English proficiency. Plaintiffs alleged in their complaint that HHS exceeded its authority under Title VI in issuing the guidance and that the guidance violates their rights under the First Amendment. The government moved to dismiss the complaint. The district court

granted the motion to dismiss, ruling that the plaintiffs lacked standing to bring the action and that the dispute was not ripe for review. The Division argued for HHS as appellee that the district court correctly dismissed the complaint for lack of standing, because, among other things, the relief that the plaintiffs seek – a declaratory judgment and injunction invalidating the guidance – would not relieve them of the obligations they have under Title VI and the regulations. The Division also argued that this dispute is not ripe for review because the issues are not fit for judicial resolution and the plaintiffs will not suffer significant hardship if judicial review is deferred. The case is pending in the Ninth Circuit.

The Lighthouse Institute for Evangelism v. City of Long Branch (Third Circuit) (argued March 27, 2007, by Assistant Attorney General Wan J. Kim)

The Lighthouse Institute for Evangelism, which conducts business as Lighthouse Mission, sued the City of Long Branch, alleging a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The City denied the Mission's application for a zoning permit to use its property as a church, because that proposed use was not specifically permitted in the zone. In granting the City summary judgment, the district court rejected the Mission's "equal terms" claim under RLUIPA. The Division argued as amicus curiae in the court of appeals that the district court erred in requiring the Mission to prove that the land use regulation at issue substantially burdened its religious exercise, in order to prove a violation of RLUIPA's "equal terms" provision. The Division argued the RLUIPA's plain language and legislative history demonstrate that the statute's "equal terms" provision does not require proof of a substantial burden on a plaintiff's religious exercise. The case is pending in the Third Circuit.

U.S. Department of Justice
Office of Attorney Recruitment and Management

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Offices, Boards, Bureaus and Divisions

FROM: Louis DeFalaise, Director

SUBJECT: Changes to the Attorney General's Honors Program and Summer Law Intern Program

DATE: April 26, 2007

This memorandum outlines significant changes and highlights Component responsibilities for the 2007-2008 Attorney General's Honors Program (HP) and the Summer Law Intern Program (SLIP). At a meeting on December 5, 2006, Components were invited to submit recommendations to improve the selection process. Based on recommendations made by the participating Components and the review that followed, the Office of the Deputy Attorney General (ODAG) has authorized this office (OARM) to implement the changes outlined below to improve the selection process. Major changes include:

- Clarifying Program standards and providing process guidance for Component use during the initial review process;
- Modifying the AVUE system to allow reviewers to add comments indicating the component specific criteria for individual selections;
- Delegating the Departmental review process to OARM and the Components;
- Providing the reasons for nonconcurrence to the Components for the purpose of reconsideration; and,
- Exempting SLIP selections from Departmental review (subject to audit) and deferring the review to Funnel Offer candidates.

1. Component Level Review

Each Component will ensure that its internal selection process is focused on selecting highly qualified candidates with credentials that establish their eligibility to be considered as an Honors level hire by the Attorney General. Initial Component-level review must comply with the review standards guidance and include an internal quality review prior to forwarding the names of candidates for interviews to OARM.

Component Review Standards Guidance

Candidates selected for interviews should have outstanding academic credentials. Reviewers should pay close attention to academic performance (as reflected by class rank, where available), grades, academic accolades, graduation honors and other achievements. Components that select a candidate with less than an outstanding academic record must provide a justification for the selection based on the candidate's skills, background, experience or training in a relevant field of the Component's practice. Suitable skills and experience include: judicial clerkships (particularly at the Supreme Court or Federal Circuit Court level); law review/journal positions and articles; competitive moot court experience demonstrating superior oral advocacy ability; or special education, skills or background directly relevant to the Department's and/or Component's priorities and missions. This list is not exhaustive. The justification should articulate the basis for selecting the candidate for interview, explain how the candidate would positively contribute to the component's mission, and should demonstrate the lack of suitable candidates possessing both the identified qualifications and a strong academic background.

Components should, as a matter of practice, check a candidate's references and review any information about the candidate that is easily accessible to the general public. When considering web-posted information, Components should exercise due caution to ensure correct identification and attribution.

It is also very important that a candidate's overall submission reflect the level of writing skills, organization, and persuasiveness commensurate with selection as an Honors level hire by the Attorney General. The quality of the candidate's overall submission, particularly the structure and content of responses in the "short answer questions" are critical factors that should be considered in assessing the candidate's character, judgment and maturity.

Finally, each Component's internal review should ensure that the selection process identifies candidates that meet Department and Component needs and that selected candidates, when compared objectively to those who were not selected, are, in fact, the best candidates for these positions.

2. Department Level Review

An ad hoc working group composed of representatives from the major participating Components will conduct a Department-level review to ensure that selections comply with the Component Review Standards and that the number of interviews does not exceed budgetary limitations. Each formally participating major Component should designate one individual to participate in this process full-time for approximately two working days. The reviews will be conducted on-site at OARM. After the review is completed, OARM will provide affected Components with a list of candidates that have been identified as noncompliant, as well as the basis for that conclusion. If, after further review, the Component still wishes to proceed with an interview, it may return a candidate's name to OARM with further explanation. If OARM

concurs, the interview can proceed; if not, the Component head can elect to request reconsideration of the candidate consistent with the practice in other career personnel matters.

3. SLIP and Funnel Offer Reviews

In order to reduce the burden on the Ad Hoc working group for Department level review and to ensure timely responses to the Components, OARM will instead randomly monitor SLIP selections for compliance with Component Review Standards and notify Components of any discrepancies along with the basis for that conclusion.

Funnel offers are subject to the same Component-level review standards and process that apply to the Honors Program. Components should forward proposed funnel offers to OARM for review and concurrence before issuing offers. OARM will provide the Component with the reason for the nonconcurrence of any proposed funnel offer. The nonconcurrence may be appealed, consistent with the practice in other career personnel matters.

The adoption of these changes, supported by the continued interest and dedication of Component personnel at all levels, should enhance one of the goals of the Attorney General's Honors Program – to continue to attract and hire highly qualified individuals from the broadest base possible.

Your personal involvement, interest in and support of the Attorney General's Honors Program is greatly appreciated. As with these and other past changes, OARM is interested in your comments and suggestions for improving the Honors Program and Summer Legal Intern Program and how we conduct them. Your further ideas and suggestions are always welcome. Thank you again.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

July 3, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to questions directed to Assistant Attorney General Wan Kim during his appearance before the Senate Judiciary Committee's hearing on "Oversight of the Civil Rights Division" on June 21, 2007.

Senator Kennedy requested that Assistant Attorney General Kim list the number of Voting Rights Act cases filed on behalf of African Americans during this Administration. During this Administration, the Voting Section of the Civil Rights Division has filed four cases and successfully litigated a fifth, in addition to interposing thirty-six Section 5 objections, on behalf of African-American voters in various jurisdictions. The cases filed include *United States v. Crockett County* (W.D. Tenn.); *United States v. Euclid* (N.D. Ohio); *United States v. Miami-Dade County* (S.D. Fla.); and *United States v. North Harris Montgomery Community College District* (S.D. Tex.), which also involved protecting the rights of Hispanic citizens. In addition, we successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.) and successfully defended that victory through appeal to the U.S. Supreme Court.

In addition, the President and the Attorney General strongly supported the Voting Rights Act Reauthorization and Amendments Act of 2006, named for three heroines of the Civil Rights movement, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King. The Civil Rights Division is currently defending the Act against a constitutional challenge in federal court here in the District of Columbia.

The Department continues to seek out, investigate, and prosecute cases on behalf of all Americans, including African-American citizens. The Voting Section continues to actively identify at-large and other election systems that violate the Voting Rights Act. Where we find such systems and where the facts support a claim, we do not hesitate to bring lawsuits. We are interested in allegations of possible Voting Rights violations from all sources and have solicited such information widely.

The Department, of course, vigorously enforces all of the provisions of the Voting Rights Act. During Calendar Year 2006, the Voting Section filed 18 new lawsuits, which is double the average number of lawsuits filed annually in the preceding 30 years. In Fiscal Year 2006, the Voting Section processed the largest number of Section 5 submissions in its history and interposed important objections to protect minority voters in Texas and Georgia. During this Administration, moreover, we have filed approximately 60 percent of all cases ever filed under the minority language provisions of the Voting Rights Act, as well as approximately 75 percent of all cases ever filed under Section 208. We also have used Section 2 of the Voting Rights Act to challenge barriers to participation, as in *United States v. Long County* (S.D. Ga.) and *United States v. City of Boston* (D. Mass.). We have filed the first voting rights case in the Division's history on behalf of Haitian Americans; the first voting rights case in the Division's history on behalf of Filipino Americans; the first voting rights case in the Division's history on behalf of Korean Americans; and the first voting rights cases in the Division's history on behalf of Vietnamese Americans. We will continue vigorously to protect all Americans from unlawful discrimination in voting.

Senator Cardin requested that Assistant Attorney General Kim send out a written affirmation within the Civil Rights Division, stating that political considerations and affiliations cannot be considered in the hiring of career employees. Attached please find a memorandum that was distributed to each of the Section Chiefs in the Division and posted on the Division's website, reaffirming this standard.

Senator Cardin also requested that Assistant Attorney General Kim provide information on the civil rights background of its hires. On April 11, 2007, the Department provided to this Committee copies of the resumes of all attorneys hired by the Civil Rights Division during this Administration. Senator Cardin also requested information on turnover within the Division. The average rate of attorney attrition in the Civil Rights Division during this Administration is almost identical (less than a 1.5 percent difference) to a comparable period of the prior Administration. During the last six years of the previous Administration, the average rate of attorney attrition was 11.83 percent. During the last six years of this Administration, the average rate of attorney attrition was 13.17 percent. During this Administration, the peak attrition rate for attorneys occurred in 2005, when a number of attorneys accepted a retirement package offered to multiple Justice Department components.

Senator Cardin further requested information on the diversity numbers within the Division. During the past six years, 30 percent of the attorneys hired by the Division were minorities. This rate of hiring far exceeds the national average as reported in a 2004 study by the American Bar Association, which found that minority representation in the legal profession is about 9.7 percent.

The Honorable Patrick J. Leahy
Page Three

Senator Whitehouse inquired as to whether the Civil Rights Division received any information alleging participation by Tim Griffin in "vote caging" before his letter of June 18, 2007. Consistent with Assistant Attorney General Kim's testimony, we have confirmed that it does not appear that any such information was received by the Division.

Please do not hesitate to contact this office if we can be of assistance in other matters.

Sincerely,

Richard A. Hertling
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 29, 2007

MEMORANDUM TO ALL ATTORNEYS

FROM: Wan J. Kim
Assistant Attorney General

SUBJECT: Guidance on Personnel Matters

I am fully committed to ensuring that all personnel decisions within the Civil Rights Division are consistent with principles of fairness as well as all applicable laws, rules and regulations. In particular, I wish to remind you that the Department of Justice is an Equal Opportunity/Reasonable Accommodation Employer. Consistent with applicable law, Department policies and my own practice, there will be no discrimination based on color, race, religion, national origin, political affiliation, marital status, disability, age, sex, sexual orientation, status as a parent, membership or non-membership in an employee organization, or personal favoritism. See generally http://10.173.2.12/jmd/employeerights.php.

Notably, each of you should be aware of the requirements of 5 U.S.C. § 2302, which sets forth the following "prohibited personnel practices" applicable to personnel actions, including but not limited to appointments, promotions, reassignments, details, pay, awards, and adverse actions:

A federal employee authorized to take, direct others to take, recommend or approve any personnel action *shall not*:

> (1) discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;
>
> (2) solicit or consider oral or written employment recommendations unless such recommendations are based on personal knowledge or records of job-related abilities or characteristics;
>
> (3) coerce the political activity of any person or take any action against any employee or applicant as a reprisal for his/her refusal to engage in such political activity;

(4) deceive or willfully obstruct anyone's right to compete for employment;

(5) influence anyone to withdraw from competition for any position for the purpose of improving or injuring the employment prospects of any other person;

(6) give an unauthorized preference or advantage to any employee or applicant for employment for the purpose of improving or injuring the employment prospects of any particular employee or applicant;

(7) engage in nepotism (*i.e.*, hire, promote, or advocate the hiring or promotion of relatives) within the agency in which the federal employee serves as a public official;

(8) engage in reprisal for whistle blowing by taking, failing to take, or threatening to take or fail to take a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety (if such disclosure is not barred by law and such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs – if so restricted by law or Executive Order, the disclosure is only protected if made to the Special Counsel, the Inspector General, or comparable agency official);

(9) take, fail to take, or threaten to take or fail to take a personnel action against an employee or applicant for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising such a right; cooperating with or disclosing information to the Special Counsel or to an Inspector General; or refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant based on personal conduct (other than criminal convictions) which does not adversely affect the on-the-job performance of the employee, applicant, or others;

(11) knowingly take or fail to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement; and

(12) take or fail to take any other personnel action, if taking or failing to take action violates any law, rule or regulation implementing or directly concerning merit system principles contained in 5 U.S.C. § 2301.

5 U.S.C. § 2302; see also http://www.usdoj.gov/jmd/ps/chpt4-1.html; http://www.usdoj.gov/oarm/attvacancies.html; http://www.osc.gov/ppp.htm#q1.

For more information, please contact the Division's Human Resources Office (202-514-4153) or the Ombudsman. I am also personally available to address any concerns that you may have.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 25, 2007

The Honorable Richard B. Cheney
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

This letter presents the views of the Department of Justice on S. 453, the "Deceptive Practices and Voter Intimidation Prevention Act of 2007," as reported by the Committee on the Judiciary. S. 453 seeks to deter the communication of false information regarding Federal elections and candidates in two ways: First, it would provide criminal and civil sanctions for the communication of false election-related information with the intent to discourage individuals from voting (the "Prohibition on Deceptive Practices in Federal Elections" provisions). Second, it would require the Justice Department (a) to provide correct information to voters affected by the false information; and (b) to report to Congress and the public all reported allegations that individuals were discouraged from voting and, in each such instance, what the Department's response was and why (the "Reporting of False Election Information" provision).

We support the overall goal of the bill: Addressing certain election-related deceptive conduct that current Federal statutes do not reach. However, we have serious concerns that the bill, as currently drafted, would give the Federal government unprecedented legal authority to insert itself into the tactics of Federal campaigns. For example, during the critical waning days of a presidential or congressional campaign, the Attorney General would have authority to initiate grand jury proceedings, issue target letters to campaign officials, and seek authority for search warrants to obtain materials stored within campaign headquarters in order to determine whether a particular person provided an "explicit endorsement" of a candidate. We are also concerned about the impact of the bill's investigative delay provisions on the Department's law enforcement efforts.

We appreciate the opportunity the Department has had to meet with Senate staff to discuss previous versions of the bill and recognize that changes have been made in the bill to address the Department's concerns. We believe the reported bill is a stronger bill and welcome the opportunity to continue to work with the Committee to refine provisions of the bill addressing current gaps in Federal criminal law, while ensuring that the bill does not have the unintended consequence of requiring the Executive branch to wade into campaign politics,

inviting allegations that the Justice Department acted or failed to act due to political motivations and tempting political operatives to use the Department to advance partisan ends.

Section 3. Prohibition on Deceptive Practices in Federal Elections

Section 3 of the bill would amend two Federal statutes to address two types of false information communicated to voters. Specifically, it would amend 42 U.S.C. § 1971 and 18 U.S.C. § 594 to provide civil and criminal responses, respectively, to the dissemination of two types of false information to voters. The first type is false information about the time, place, and qualifications for voting, disseminated in order to prevent qualified voters from voting (generally called "voter suppression" schemes). The second type is information communicated in order to mislead voters about the positions or beliefs of a particular candidate, for the purpose of garnering support for or opposition to that candidate (generally called "false campaign rhetoric" schemes or campaign tricks).

Specifically, the proposed amendments to sections 1971 and 594 would sanction behavior that knowingly communicated false election-related information "with intent to prevent another person from exercising the right to vote or from voting for the candidate of such other person's choice." Election-related information, as defined in proposed new subparagraphs 1971(b)(2)(C) and 594(b)(1)(C), includes: (a) the time, place, or manner of conducting the election; (b) the qualifications for or restrictions on voter eligibility for the election; and (c) the explicit endorsement by any person or organization of a candidate running for any office voted on in the election.

We generally support the proposed criminal provision that covers false information relating to elections, voting, or voter qualifications. The dissemination of this information is intended to suppress or interfere with the act of voting and therefore warrants criminalization and the creation of civil remedies.

We also support the bill's increase in the criminal penalty, from one year of imprisonment to five years, for intimidating voters in a Federal election in violation of 18 U.S.C. § 594. We note that the new penalty would match the five-year penalty contained in the voter intimidation provision of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-10(1).

However, we have serious concerns about the bill application to false campaign rhetoric. We explain these concerns below.

Voter Suppression. An existing Federal criminal law, 18 U.S.C. § 241, arguably covers schemes to prevent voting in a Federal election by misleading voters as to the time, place, and prerequisites for voting. Specifically, section 241 criminalizes conspiracies to injure, oppress, threaten, or intimidate that deprive persons of rights protected by the Constitution or Federal law, including the right to vote for a Federal candidate and not have that vote diluted by fraudulently

cast ballots. *Anderson v. United States*, 417 U.S. 211 (1974). A Federal district judge recently upheld application of section 241 to a scheme to suppress voter turnout in a Federal election by jamming the telephone lines of entities offering transportation to the polls. *United States v. Tobin*, Cr. No. 04-216-01-SM, 2005 WL 3199672 (D.N.H. Nov. 30, 2005). Accordingly, when the suppression activity takes place in a Federal election, it may violate section 241. However, section 241 does not expressly state that it applies to voter suppression activity and thus its coverage of this conduct is left to judicial interpretation. We believe that a clear expression of congressional intent to criminalize corrupt acts that are designed to suppress voting would facilitate enforcement and simultaneously deter some who might consider engaging in such a scheme.

False Campaign Rhetoric. We have several concerns regarding the bill's coverage of false statements regarding "explicit" endorsements of candidates. The Federal Election Campaign Act ("FECA") provides criminal penalties for several types of false, damaging, or misleading statements about Federal candidates. Specifically, 2 U.S.C. § 441d(a) requires that Federal electioneering communications accurately identify the person or entity authorizing and paying for the communication, and 2 U.S.C. § 441h(a) prohibits agents of one Federal candidate or political party from fraudulently misrepresenting authorization to speak on behalf of a rival Federal candidate or party. Violations that are committed knowingly and willfully and involve expenditures aggregating $2,000 or more in a calendar year are misdemeanors punishable by one year of imprisonment, and knowing and willful violations aggregating $25,000 or more in a calendar year are felonies punishable by five years of imprisonment. 2 U.S.C. § 437g(d)(1)(A).

Both Congress and the courts have long recognized that clarity in the scope of a criminal statute is essential to effective enforcement and that such clarity is particularly crucial when a criminal provision reaches speech that might be protected by the First Amendment. Thus, other than the two FECA provisions noted above, Federal criminal laws do not attempt to reach the tactics and rhetoric of candidates. For example, the mail fraud statute, 18 U.S.C. § 1341, has never been held to apply to false campaign statements, as the statute is limited to schemes to obtain money or property or to deprive another of someone's "honest services," and campaign statements involve neither. *McNally v. United States*, 483 U.S. 350 (1987); *United States v. Turner*, 459 F.3d 775 (6th Cir. 2006). Moreover, statements by political candidates during an election contest generally do not have the reliance potential of statements made in a fiduciary or commercial setting. Similarly, the Federal statutes criminalizing conspiracies against the deprivation of Federal civil rights, 18 U.S.C. § 241, and the deprivation of Federal constitutional rights, 18 U.S.C. § 242, have never been asserted to criminalize incidents not directly bearing on the voting process itself, and the Federal statute criminalizing certain activities relating to voting and campaigning, 18 U.S.C. § 245(b)(1)(A), is limited to conduct entailing threats or use of force.

We believe that the meaning of "explicit endorsement" may raise constitutional vagueness concerns under the First Amendment, as well as enforcement obstacles. Both

problems occur for the same reason: the difficulty of knowing what is "true" and what is false about explicit endorsements and, therefore, what is permissible to say and what is not during a campaign for a Federal office. This provision might criminalize well-accepted campaign rhetoric and tactics and involve the Department in disputes certain to raise claims of political motivation. For example, it is unclear what manner and degree of support are required to rise to the level of an "explicit endorsement." Would a candidate violate this provision by showing that a person had approved of the candidate in another setting (as opposed to the pending election)? The meaning of the term is unclear. Additionally, a candidate might give a speech in which he accurately states that he "has the strong support of leading veterans' organizations." In fact, he does have the strong support of veterans' organizations A and B, but he does not have the support of veterans' organizations C and D. His opponents believe that organizations C and D are the real "leading veterans' organizations," and file a complaint alleging that the candidate had knowingly communicated false campaign-related information, falsely claiming the "explicit endorsement" of "leading veterans' organizations." Under S. 453, the candidate would be placed in substantial jeopardy of being held liable for civil and criminal penalties merely for making a truthful assertion while exercising his core First Amendment rights in furtherance of his candidacy. As can be seen by the foregoing and other examples, the "explicit endorsement" provision is impermissibly vague and overbroad, and would have a powerful, chilling effect on legitimate political speech.

While the bill would clarify that the endorsement must relate to an upcoming election, that change would address only one aspect of the provision's ambiguity. The term "explicit endorsement" itself remains unavoidably broad and ambiguous. For example, it would cover a simple statement of support uttered by one person to another in an informal, social setting, as well as a formal, public statement of support for a candidate. We have strong concerns about the use of this terminology in a provision that would criminalize a form of political campaign rhetoric.

The Supreme Court has explained that speech relating to an election is at the core of the First Amendment's protections:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York*, 333 U.S. 507, 510 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . of course includ[ing] discussions of candidates . . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust,

> and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Buckley v. Valeo, 424 U.S. 1, 14-15 (1976).

The criminal provisions in the bill may chill speech about endorsements immediately prior to an election and this speech is at the very core of the First Amendment. As the Supreme Court stated 30 years ago in its landmark decision addressing the constitutionality of limits on Federal campaign contributions and expenditures, ambiguity in the scope of a provision relating to Federal elections "raises serious problems of vagueness, particularly treacherous, where, as here, the violation by its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise First Amendment rights." *Buckley*, 424 U.S. at 99-100. When *Buckley* was decided, the FECA's criminal penalty was a single year of imprisonment. S. 453 would impose a criminal penalty of five years of imprisonment posing an even greater likelihood of chilling protected speech. Moreover, the uncertainty of the provision's coverage would be compounded in criminal prosecutions, where the Government would be required to prove, beyond a reasonable doubt, not only that the statement was false, but also that the defendant was aware of its falsity.

In sum, we believe that attempts to reach beyond the proposed prohibition on voter suppression to criminalize what amounts to the political dialogue between opposing candidates may raise constitutional issues as well as enforcement concerns. We would be happy to work with Congress to attempt to craft a narrowly drawn provision that would avoid these concerns.

In any event, we initially would suggest clarifying the type of candidates covered by the bill's provisions. On page 7, at lines 8-11, and on page 9, at lines 15-18, the bill would prohibit false statements regarding the "explicit endorsement by any person or organization for the upcoming election of a candidate to any office described in subparagraph (B)." Because subparagraph (B) includes a reference to mixed Federal and State elections, there is an ambiguity as to whether the bill would prohibit endorsements relating to a candidate for State or local office. We recommend revising this to clarify that endorsement must relate to a Federal office described in subparagraph (B). The clarification could be achieved by inserting the word "Federal" before the word "office" in both of these locations.

We have additional, more specific, comments and suggestions on section 3. The first one concerns the bill's treatment of intent. As set forth above, the bill would sanction the knowing communication of election-related information "with the intent to prevent another person from

exercising the right to vote or from voting for the candidate of such other person's choice." In practice, the intent typically is not "to prevent" persons from voting or voting for a candidate of their choice, but rather to deceive them into choosing not to vote or to vote for someone they might not otherwise support. Therefore, the standard "to prevent" might prove difficult to establish in practice and might not effectively address the conduct the bill seeks to counteract.

We also recommend modifying the bill's prohibition of deceptive practices designed with "the intent to prevent another person . . . from voting for the candidate of such other person's choice." While this provision addresses the concern that some deceptive practices are not intended to suppress voter participation, but rather are intended to deceive targeted voters into voting for a candidate, we believe that the bill's language requires further clarification. This is so because, as currently written, the bill could be construed to require proof of victimized voters' original candidate choices *as well as* proof of the defendant's intent to deceive the voters into altering those choices, in order to obtain a conviction. Specifically, the bill's prohibition against using deceptive information to "prevent another person from . . . voting for the candidate of such other person's choice" could be read to suggest that the Government must be able to discern and prove who the voter would have supported absent the misinformation, a requirement that would entail probing the victim of the bad conduct and compromising the confidentiality of the individual's vote. To avoid this concern, we recommend revising the relevant provision to refer, for example, to the defendant's "intent to use deceptive information to influence voter choice." We also recommend for subsection 2(A)(ii) language that captures the full scope of conduct that might be used to suppress or influence another's vote: "has the intent to mislead voters, or the intent to impede, hinder, discourage or prevent another person from exercising the right to vote."

Second, while the terms "time" and "place" are straight-forward and are commonly understood in the election context, the term "manner" may be ambiguous. For example, "manner" may be intended to cover information such as the division of precincts or whether voter assistance is available. However, the term may be interpreted much more broadly to encompass a candidate or community group calling the election a "referendum" on a particular issue.

Third, the proposed criminal provision contains no materiality requirement, which means that individuals could be investigated and prosecuted for a felony for potentially *de minimis* conduct. Without a materiality requirement in a criminal statute such as this, Congress would be authorizing the Department of Justice to divert scarce investigative and prosecutorial resources to pursue technical inaccuracies that had little if any potential to affect electoral decision-making.

Section 4. Reporting of False Election Information

We strongly oppose section 4 of the bill.

Subsection 4(a) provides that any person may report a potential violation of the bill's provisions to the Department of Justice. We oppose this subsection, first, because it is

unnecessary. Under existing law, any person or organization may report a possible violation of Federal law to the Department of Justice, and they routinely do so. Second, the provision is problematic because it would suggest inaccurately that violation of this provision is somehow different from other violations, with respect to the right of citizens to report them to law enforcement authorities.

Subsection 4(b) of the bill provides that, upon the filing of a "report" providing a "reasonable basis for finding a violation," the Attorney General "shall pursue any appropriate criminal prosecution or civil action" and "shall refer the matter to the Civil Rights Division . . . for criminal prosecution or civil action" if the Civil Rights Division has jurisdiction. We strongly oppose this provision. It is unnecessary and a troubling intrusion into the details of how the Department of Justice handles allegations of violations of Federal law.

When the Department receives an allegation of a violation of any law, the allegation is reviewed and handled by the appropriate offices within the Department with jurisdiction over the subject matter. Alleged violations of these new provisions would be handled in precisely the same way and the bill should not suggest that these allegations would be treated differently than all others. The Department already is charged with enforcing the Nation's civil and criminal laws and we are not aware of any other criminal provision that contains a statutory directive that the Department of Justice "shall pursue any appropriate criminal or civil action."

In addition, to the extent that this provision would require the Attorney General to refer to the Civil Rights Division "for criminal prosecution or civil action" any and all complaints that have a "reasonable basis," it raises separation of powers concerns, because it intrudes upon the prosecutorial discretion that stems from the vesting of the Executive power in the President by Article II of the Constitution of the United States. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Although the word "appropriate" in subsection 4(b) might be read to grant the Attorney General discretion to determine whether to pursue — and therefore, whether to refer to the Civil Rights Division — complaints for further prosecutorial action, the phrase "any appropriate" does not appear immediately before "shall refer." To avoid these concerns, we recommend revising subsection 4(b) to state that the "Attorney General shall refer any matter he deems appropriate to the Civil Rights Division . . . ."

Finally, subsection 4(c) of the bill would prohibit criminal investigations into alleged deceptive election practices until after the election unless the Attorney General "reasonably believes" prompt action is necessary and "reasonably determines" an investigation or enforcement action would not inhibit voting. We strongly oppose this provision. It would constitute an unprecedented statutory restriction on the ability of the Department of Justice to investigate violations of Federal law. Moreover, it is unnecessary in light of the Department's written and long-standing criminal law enforcement policy of noninterference in the election process. Tbis policy, which is carried out by carecr law enforcement professionals in the

Department of Justice, is intended to avoid the dangers likely to flow from a criminal investigation during an election campaign:

> In investigating an election fraud matter, federal law enforcement personnel should carefully evaluate whether an investigative step under consideration has the potential to affect the election itself. Starting a public criminal investigation of alleged election fraud before the election to which the allegations pertain has been concluded runs the obvious risk of chilling legitimate voting and campaign activities. It also runs the significant risk of interjecting the investigation itself as an issue, both in the campaign and in the adjudication of any ensuing election contest.

FEDERAL PROSECUTION OF ELECTION OFFENSES 91-92 (7th ed. 2007); *see* FEDERAL PROSECUTION OF ELECTION OFFENSES 61 (6th ed. 1995).

Moreover, the facts and circumstances of each case are unique, and the decisions regarding which investigative steps should be taken, and when, should be made by career professionals who are charged with enforcing these complex laws. The Department is very concerned about a statutory restriction on the exercise of this professional and prosecutorial discretion, and particularly concerned about removing these decisions from the discretion of the line attorneys, and placing them exclusively with the Attorney General himself or herself.

Section 5. Corrective Action

Section 5 of the bill is an improvement over earlier versions of the bill, in that it would limit the types of deceptive practices for which the Attorney General would be required to provide corrective information and it would add a materiality requirement. Additionally, the bill would apply only to deception about the time and place of the election and voter eligibility requirements that "could materially hinder any citizen's right to vote." Nonetheless, the provision remains fundamentally flawed and, for the reasons that follow, the Department must continue to oppose section 5. Furthermore, the bill would supplement the earlier versions of the bill by adding a provision enabling individuals to seek an order in Federal district court requiring the Attorney General to take action, which the Department strongly opposes.

Section 5 of the bill seeks to provide a mechanism for the Federal government to remedy allegedly false information to voters. However, it contains two mutually exclusive directives: First, it would require remedial action by the Department before the election "to correct" such false information. Second, it would bar any "investigation" of the allegation — presumably by the Civil Rights Division, although this is not stated expressly — unless (1) necessary to determine the need for corrective action and (2) the Attorney General reasonably determines that such investigation "will not inhibit any person from voting." We cannot conceive how the second requirement for pre-election remedial action ever could be achieved.

By requiring the Department to take corrective action before an election, the first directive inevitably would inject the Department directly into ongoing political campaigns in a manner that is unprecedented and would result in serious consequences adverse to the campaign dialogue that is an essential feature of our democracy. Whether the Department investigates an allegation in contemplation of initiating an enforcement action or taking corrective action, it is not possible to remove the potential danger that the Department's action might interfere with the election. Similarly, it would be impossible to conclude that a contemplated enforcement action would not inhibit anyone's voting activity. Finally, the provision appears to misapprehend the scope of investigation the Department would need to conduct before taking any corrective action.

This misapprehension is clear from the unduly onerous requirements implicit in subsection 5(b). Subsection 5(b) of the bill would permit any individual providing "a reasonable basis" for a complaint under the bill to seek an order in Federal district court directing the Attorney General to take action if the Attorney General had not done so within 72 hours or less of the complaint, depending on the circumstances. In addition to our overarching concern about injecting the Department into political campaigns to an unprecedented degree, this provision is problematic for several reasons.

First, when the Department's attention might be better spent fielding complaints and preparing to monitor elections, valuable time and resources will be spent in court litigating over whether the Attorney General should have acted or at least acted sooner.

Second, setting aside momentarily our concerns about departmental investigations interfering with or influencing ongoing campaigns, 72 hours is just not enough time. The provision permits 72 hours not simply to respond to a complaint by initiating an investigation, but to act "to take corrective action." While the Department appreciates the need to move quickly — particularly in the days before an election — it takes time to assess the validity and basis of a claim, especially when many such claims can be expected. It is reasonable to anticipate that few complaints would present clear-cut cases of violations and that most complaints would require investigation and consideration of the law's application to new factual scenarios. In some cases, the Department would need to dispatch attorneys and other personnel to conduct a preliminary investigation to determine whether further action was warranted.

In addition to the fundamental concerns we have noted above, there are other problems with section 5. First, subsection (a) would require that the Attorney General (1) "immediately" review a reported allegation of false information relating to voter qualifications or the time or place of an election and then (2) determine if there were a reasonable basis for finding that the false information had been communicated or produced with the intent to communicate, and, if so (3) "undertake all effective measures necessary to correct such false information by providing correct information relating to the time or place of the election or the qualifications for or restrictions on voter eligibility to voters affected by false information." Given that the corrective action would be disseminated prior to elections, it can be anticipated that candidates and political

parties would be tempted to use this provision to make complaints designed to cast their political rivals in a poor light. In addition to thrusting the Department into the middle of elections and political gamesmanship, such complaints would make the task of identifying meritorious complaints more difficult amidst the many politically motivated complaints that could be anticipated under this bill in the final days of a Federal election campaign.

Second, under subparagraph (a)(1)(A) the Attorney General also would be required to determine whether allegedly false information, if not yet communicated to voters, was "produced with the intent that such information be communicated." This provision not only would interject the Department directly into a campaign's production of advertisement, but would require the Department to evaluate material that had not been disseminated and then try to determine the "intent" with which it was produced.

Third, this provision would be triggered simply by a "report" of an alleged communication or production of information that violated 42 U.S.C. § 1971 or 18 U.S.C. § 594. It is likely that the Department would be inundated with reports of "possible" misinformation before a Federal election and then required to evaluate all of the reports and disseminate "correct information" to voters affected by the allegedly false information.

Fourth, the bill provides little guidance as to what would constitute "correct information." The bill's provision that the corrective information "shall only consist of information necessary to correct the false information" does little to provide clarification. The content of the corrective information itself would be politically sensitive and thus not appropriate for the Department to determine. There is a fine line between objective and factually correct information and information that could be perceived as favoring or disfavoring one candidate or party.

Fifth, the bill does not provide a threshold standard for the credibility of election-related complaints, and the complaints are not limited to actions by candidates. Thus, this provision not only would require the Department to investigate any election-related allegation of fraud involving candidates, but also those involving organizations, political parties, unions, referendums, issues, and individuals who may be involved in election-related activity. Any follow-up investigation could be expected to have a chilling effect upon voters as well as those under scrutiny. The provision is likely to generate numerous politically motivated complaints, triggering mandated enforcement action that would force the Department to deplete limited resources investigating what, in many cases, would be unsubstantiated claims.

Sixth, the bill does not articulate a standard for assessing whether a complaint requires remedial action. Accordingly, the Department would be thrust into the role of Federal election referee, determining whether election related-information distributed to the public required remedial action, without a clear standard for making such a determination. For example, the bill provides no guidance as to what types of false information "could materially hinder" a citizen's right to vote.

Seventh, the Department of Justice is primarily a law enforcement agency, with expertise in enforcing the civil and criminal statutes within the Department's specifically defined areas of jurisdiction. The bill's provisions relating to the dissemination of corrective information would create an administrative function not well-suited to the Department's mission or its expertise. Indeed, the bill's remedial action function potentially is inconsistent and incompatible with the law enforcement responsibilities spelled out in the bill. Subparagraph 5(c)(2)(A) would require the Department to consult with the Federal Communications Commission and Election Assistance Commission about alternatives for disseminating corrective information, but the ultimate responsibility for providing this information under the bill rests with the Department. Another agency might be better-equipped to serve this function.

Finally, section 5 would create an unusual conflict of interest within the Department. The Department would be tasked with investigating and prosecuting election fraud allegations, while at the same time required to review campaign literature and take remedial action in instances where there was a "report" of a "possible violation" of the voting fraud statutes. This raises the question of whether remedial action would be required in every instance in which the Department opened an election fraud investigation. Furthermore, the provision would place the Department in the untenable position of simultaneously disseminating correct information to the public and ensuring a prospective defendant's right to a fair trial.

Section 6. Reports to Congress

Section 6 of the bill would require the Department, following each Federal general election, to provide information to Congress and to the public concerning voter deception activity. The Department has several concerns about this section.

First, paragraph 6(b)(1) sets forth the contents of reports that the Department would be required to file with the Congress and make available to the public within 90 days of every Federal general election. The reports would be required to include details regarding each allegation of deceptive practice in a Federal primary, run-off, or general election, the Department's response thereto, the status of any investigation of the allegation, and the rationale for not pursuing an allegation. While the bill would exempt information that would infringe the rights of criminal suspects, it does not go far enough to accommodate sufficiently the sensitive nature of criminal investigations, which Congress has found warrants protection from disclosure. *See* Freedom of Information Act, 5 U.S.C. § 552(b)(7).

Second, section 6 would create a burdensome obligation for the Executive branch to report to Congress. Ninety days is not a reasonable time period for the Department to report on the many complaints processed and investigations started in a typical election year. After a general Federal election, the Department may have to process in excess of a thousand reports received through telephone calls, the Internet, Federal observers, Department monitors, and

election monitors for advocacy groups, candidates, and others. For example, during the November 2006 general elections, the Department deployed in excess of 800 Federal personnel to monitor and observe elections around the country; each one of those observers and monitors produced a report of his or her observations at one or more polling places. Those reports would have to be reviewed and processed and, where appropriate, follow-up information might have to be gathered.

Third, the bill would mandate public disclosure of internal Department protocols and potentially privileged information. For example, it would require the Department to explain why it did not pursue a particular complaint or allegation. This type of information is part of the deliberative process and enjoys constitutional protection from mandatory disclosure.

Finally, subparagraph 6(b)(1)(G) would require the Department to report on the "effectiveness of corrective action." It is difficult to imagine how the Department would be able to determine criteria for what constitutes "effective" corrective action, measure (if such a thing is even possible) according to those criteria, and report to Congress within 90 days of each general election for a Federal office.

We appreciate the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Harry Reid
Majority Leader

The Honorable Mitch McConnell
Minority Leader

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary

The Honorable Arlen Specter
Ranking Minority Member
Committee on the Judiciary

July 9, 2007

Responses from Brian K. Landsberg
To questions from Chairman Patrick Leahy
Civil Rights Division Oversight Hearing

Q. I am troubled by the significant drops in these areas of civil rights enforcement [employment and voting] and I am concerned that the current Civil Rights Division has not made a high priority the process of actively seeking out anti-discrimination cases, rather than merely wait for such cases to emerge on its radar screen. Do you share my concern?

A. I believe the historic mission of the Civil Rights Division since 1960 has been to actively seek to identify violations of the civil rights laws. In the period 1957-1959, the policy was to wait for complaints before investigating. When Assistant Attorney General Harold Tyler and his deputy, John Doar, came to the Division in 1960 they began field trips to areas where there was reason to believe that voting rights were being denied because of race. They converted the legal staff from desk lawyers to proactive litigators. That model has served the country well, and I would be concerned about any departure from it.

Q. What resources could the Civil Rights Division tap into for further investigation of civil rights violations and allegations?

A. In the area of employment, the Equal Employment Opportunities Commission has been an important partner, which has access to extensive information regarding employment patterns. It is also essential to maintain relations with civil rights groups and encourage them to inform the Division of areas of concern. Study of statistical patterns may also reveal possible discrimination. For example, after Congress expanded Title VII to cover employment practices of public school districts in 1972, the Division compared census data regarding the number of African American teachers in selected Standard Metropolitan Statistical Areas with data showing the number of African American teachers in school districts in the SMSA. We found that in the St. Louis SMSA there were several school districts that had hired almost no African American teachers, despite the high proportion of teachers in the SMSA who were African American. This information triggered an investigation, which led to several successful employment discrimination cases.

Q. Historically, have the Division attorneys developed relationships in local communities so that they could be more successful n uncovering violations of federal civil rights laws?

A. Yes. Of course, given the size of the country and the number of Division attorneys, they cannot develop such relationships in every community. However, using information such as described in my previous answer, they can and should target possible

problem communities and cultivate relationships in them. At times United States Attorneys have been helpful in helping the Division to develop such relationships.

Responses from Brian K. Landsberg
To questions from Senator Dianne Feinstein
Civil Rights Division Oversight Hearing

Q. Are there any steps you believe the Department should take to ensure that the views of career staff receive respectful consideration?

A. I believe there are two types of steps the Department should take. First, it should ensure that there are formal, regularized procedures for staff to make recommendations and for the leadership to act on those recommendations. Those procedures should include a requirement that staff draft justification memoranda that explain the factual, legal and policy reasons for the staff recommendation. The procedures should then require that at any level where a higher official overrules recommendations from below, the official must explain in writing the factual, legal, or policy basis for doing so. Second, the Attorney General and/or Assistant Attorney General should orally discuss the competing recommendations of career staff and political appointees prior to making a final decision. Career staff should be given the opportunity to explain their position. The Attorney General and Assistant Attorney General should set an example for the political staff. If they treat career staff with respect, their political staff will be more likely to do so as well.

Q. What indicators can this Committee use to find out whether a front office decision to overrule career staff is the result of politicized decisionmaking rather than good-faith disagreement about the law?

A. One indicator is whether the procedures described above have been followed. As Justice Powell explained in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U;.S. 252 (1977), "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." Justice Powell's decision also noted that "substantive departures too may be relevant...." In addition, subsequent action of courts may indicate that the front office decision either had a solid legal rationale or that it did not. If the front office does give reasons for overruling the staff recommendation and the reasons are weak, it becomes more likely that the staff was overruled by politicized decisionmaking. Evidence of improper political pressure from outside the Division could also indicate the presence of politicized decisionmaking.

August 14, 2007

Senator Patrick Leahy
Chairman, United States Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Leahy:

Thank you for the opportunity to testify at the Committee's Civil Rights Division Oversight hearing earlier this summer. Thanks too for the opportunity to respond to Senator Durbin's follow-up questions. Please forgive my delay in responding to your letter: over the summer I moved across the country to take a new job at the University of Colorado School of Law and your letter addressed to my former address at the University of Maryland School of Law did not reach me until August. My apologies for any inconvenience.

One of Senator Durbin's questions inquired about current Employment Litigation Section chief David Palmer's nomination to fill a vacancy on the Equal Employment Opportunity Commission. I understand that Mr. Palmer has since withdrawn his name from consideration for that position. For that reason, I will focus on Senator Durbin's remaining question:

Question: Professor Norton, your testimony paints a very troubling picture of this Administration's weak efforts when it comes to enforcing Title VII – our nation's most important employment discrimination statute. We have heard a lot of criticism in recent months about Civil Rights Division personnel practices and politicization of voting rights cases, but your testimony is one of the first critiques of this Administration's Title VII enforcement shortcomings. You have shown that this Administration's efforts to combat employment discrimination against African Americans, Latinos, and women is woefully inadequate. To what do you attribute this troubling trend? Is it the fault of the political appointees in the Civil Rights Division, the section chief in the Division's Employment Litigation Section, or other Justice Department and White House officials?

Response: Executive branch political leaders are ultimately accountable to the public for the success or failure of federal law enforcement efforts, as the political leadership is responsible for setting enforcement priorities and directing the work of career attorneys in achieving those enforcement goals. The Division's performance is thus the result either of the political leadership's choice of enforcement priorities or its failure adequately to hold career leaders accountable for their work. To be sure, career leaders play an instrumental role in helping identify priorities, sharing their insights about effective enforcement strategies, and supervising the day-to-day work of dedicated career professionals. But, in the end, political leaders in the Division -- as well as elsewhere in the Department of Justice and the White House -- are responsible

for enforcement deficiencies. Such shortcomings could be attributable to any or all of the following: failing to communicate that Title VII enforcement of all types should be a priority, failing to devote sufficient resources to enforcement efforts, failing to retain or select career leaders committed to those efforts, and/or failing to monitor, supervise, and hold career leadership accountable for their performance.

Again, thank you for the opportunity to provide testimony on the important matter of the Civil Rights Division's Title VII performance efforts. Please do not hesitate to contact me if I can be of any further help.

Sincerely,

/s/

Helen Norton
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SUBMISSIONS FOR THE RECORD

STATEMENT OF U.S. SENATOR BENJAMIN L. CARDIN
SENATE JUDICIARY COMMITTEE HEARING ON
"CIVIL RIGHTS DIVISION OVERSIGHT"

Thursday, June 21, 2007

"I thank Chairman Leahy and Senator Kennedy for asking me to chair this hearing today.

"It is fitting that we hold this hearing today, as we approach the 50th anniversary of the Civil Rights Act of 1957, which created the Civil Rights Division. This was the first civil rights legislation enacted in the United States since Reconstruction.

"This hearing is also part of the Committee's ongoing investigation of the firing of U.S. Attorneys for improper reasons and the growing influence of politics at the Department of Justice. We will examine to what extent political appointees overrule the recommendations and advice of career prosecutors and staff at the Civil Rights Division when it comes to enforcing the law, and when it comes to the hiring, promotion, and firing of staff.

"I am gravely concerned that over the past 6 years the Bush Administration has permitted, and even encouraged, political considerations and influence in deciding whether to enforce the law. We will scrutinize the performance of the Division in enforcing anti-discrimination statutes enacted by Congress, including laws relating to voting rights, civil rights, housing, and employment. The Division has the unique resources, obligation, and mandate from Congress to file these types of cases to protect minority rights throughout the United States. In many cases only the Justice Department can file the type of complex and far-reaching cases that can challenge and ultimately remedy and destroy discriminatory practices and patterns, as we continue our long and unfinished journey towards achieving equal rights and equal justice under the law for all Americans.

"I am disturbed by today's story in the *Washington Post*, which gives numerous examples of the improper role that politics is playing in the Division. I will ask Assistant Attorney General Wan Kim and the witnesses under oath whether they think it is appropriate and consistent with the law and Justice Department regulations for a manager to ask his Justice Department staff whom they voted for in an election; whether this is an appropriate factor to consider when hiring, firing, and promoting staff; whether these types of incidents create a culture of intimidation at the Division; whether this culture may have contributed to a large number of resignations and retirements from the Division, followed by the hiring of a less experienced, less diverse, and more ideological group of lawyers; and whether these practices undermine the credibility of the lawyers at the Division and the overall reputation of the Department of Justice."

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TESTIMONY OF

ROGER CLEGG,

PRESIDENT AND GENERAL COUNSEL,

CENTER FOR EQUAL OPPORTUNITY

ON

OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S

CIVIL RIGHTS DIVISION

BEFORE THE

SENATE JUDICIARY COMMITTEE

June 21, 2007

Dirksen Senate Office Building, Room 226

Thank you very much, Mr. Chairman, for the opportunity to testify today. My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Falls Church, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation.

I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991. My career at the Justice Department began, however, five years before that, when I was first hired to a nonpolitical slot there, in a different office. Then I held several positions as a political appointee, but I went back to nonpolitical status when I was Assistant to the Solicitor General. I finished my service at the Department as a political appointee, including my four years as a Deputy Assistant Attorney General in the Civil Rights Division.

Overview

Mr. Chairman, as you know, I have to submit my testimony—reasonably enough—in advance of when the head of the Civil Rights Division, Mr. Wan Kim, will be questioned by the Committee, but I am going to assume—based on similar hearings before the Senate Judiciary Committee last November 16, a House Judiciary Committee subcommittee hearing earlier this year, news accounts, and my own experience in Washington, including my time at the Civil Rights Division—that the Division's record will be criticized in three basic ways. These are the same criticisms that are always made during oversight hearings of the Division.

First, some members of the Committee will say that the Division is not bringing enough of the kinds of cases they would like. Second, and conversely, some members will argue that the Division is bringing too many of the kinds of cases that they do not like. And, third, some members will say that the hiring process and other ways in which political appointees deal with career lawyers has become wrongly politicized. The fact that the criticisms are not new does not make them false, of course, but recognizing this helps to keep things in perspective.

Since Congress appropriates money for the Division and wants it to enforce the laws it has passed, it makes sense for the members to keep on eye on what sort of job the Division is doing—so long, of course, as the oversight process does not become so onerous that it actually prevents the Division from doing its job. If the members don't agree with the way the Division is interpreting the law, or don't like the enforcement priorities it has set, they can certainly argue with the Division leadership about these matters. But ultimately the call is, of course, the Executive Branch's.

And the questioning at hearings like these should be civil, as befits conversations between two coequal branches of government. There will inevitably be differences of opinion about how to interpret laws and what the Division's priorities ought to be. There is nothing sinister about this. I have to say, Mr. Chairman, that when I read the transcript

of last fall's oversight hearings before the Senate Judiciary Committee, I discerned a distinct lack of civility in some Senators' questioning of Mr. Kim. I hope that this doesn't repeat itself at this week's hearings.

Legitimate Changes in Legal Interpretations and Enforcement Priorities

There will be legitimate differences of opinion—among members of the Committee, between members and the administration, and between political and career lawyers in the Division—about how to interpret the civil rights laws. Judges don't interpret the laws the same way; neither do government lawyers. And, of course, outside groups like mine will sometimes be critical of the Division. I have criticized the Division during the Clinton administration, and I have criticized it during the Bush administration. Many of you think the Division has been too conservative; well, I think it has not been conservative enough.

I am including with my statement today a paper that I delivered at a political science conference last year at the University of Virginia, comparing the enforcement policies of the employment antidiscrimination laws at the Civil Rights Division during the Clinton and Bush administrations, respectively. I noted there, in particular, differences I saw with respect to disparate impact lawsuits and challenges to what I call "affirmative discrimination"--a.k.a. reverse discrimination. The Clinton administration was more aggressive--so aggressive, for example, that it was fined over $1.7 million for overreaching in one matter--in bringing disparate impact cases (which is too bad, since the theory on which such cases depend is misguided, and they often result in more rather than less discrimination), and with only one possible exception never challenged affirmative discrimination (which is also too bad, since the civil rights laws ought to be interpreted to protect all of us from discrimination on the basis of race, ethnicity, or sex). But the Bush administration has, nonetheless, brought and continued to litigate some disparate impact lawsuits, and it has not been terribly aggressive in challenging affirmative discrimination, so it has not been perfect either, at least by my lights.

There will also be differences of opinion—again, among members of the Committee, between members and the administration, and between political and career lawyers in the Division—about how to set law-enforcement priorities. The lack of enthusiasm that the Clinton administration had for challenging affirmative discrimination had to do, I suspect, not only with a difference of opinion in how it read the law, but also with a belief--misguided in my opinion--that fighting such discrimination was just not as important as other items on its agenda. The Bush administration's greater care in bringing disparate impact cases may reflect, again, not just a difference in how it reads the statutes, but also in a belief that, say, human trafficking is a more pressing problem than, say, a fire department's alleged overemphasis on one kind or another of physical conditioning.

In addition, even without differences in law-enforcement philosophy, the Division's priorities will change over time. Congress will pass new laws. Lawbreaking will become more common in some areas, and less common in others.

For instance, the Bush administration has spent much time enforcing the Help America Vote Act, which was just passed in 2002. New statutes often require a great deal of enforcement attention, to educate those affected to its requirements. The administration has spent more time, proportionately, enforcing the foreign-language ballot provisions of the Voting Rights Act than the Division did several decades ago. This probably reflects the fact that we have many more jurisdictions and voters affected by those provisions now than we did back then, because of increases in immigration. I say this, by the way, even though in my opinion those provisions of the Voting Rights Act are misguided as a policy matter and unconstitutional as a matter of law. The Division is also spending a lot of time enforcing laws that prohibit discrimination against servicemen and servicewomen; this is also unsurprising, since there will probably be more such cases in a time of war than in a time of peace.

An article in *The New York Times* last week (June 14) discussed the greater emphasis being given religious discrimination cases in this administration. [link: http://www.nytimes.com/2007/06/14/washington/14discrim.html?_r=1&hp&oref=slogin] But that article concedes that the cases being brought are meritorious. "The department has prevailed in many, if not most of the cases in which it has become involved," has "successfully argued ... [against] improperly suppressed religious expression," and "has, in effect, duplicated in the religious arena its past success in cases involving race and national origin." And here again, it should be noted that one of the statutes the Division is enforcing in this area--the Religious Land Use and Institutionalized Person Act (passed in the summer of 2000 by unanimous consent and signed by President Clinton that September)--was new when the administration took office, which means it is unsurprising that the Division has given its enforcement special priority. Likewise, the article noted the increase in human trafficking cases--which it called "a favored issue of the religious right"--but the Trafficking Victims Protection Act, which makes it easier to prosecute criminal misconduct involving human trafficking and which the Clinton administration had pushed for--is another recently enacted statute, passed just before the November 2000 presidential election.

Some people have criticized the Division for concentrating proportionately fewer resources than in years past on bringing cases that allege discrimination against African Americans. But accepting *arguendo* that there has been such a decline, one must bear in mind, first, that the Division now has many more laws to enforce, and, second, that discrimination against African Americans is less pervasive now than it was in 1964. To give just one example, we would hardly expect a southern city to discriminate to the same degree in its municipal hiring today--when African Americans have much more political power and may even constitute a majority of its city council and other municipal offices, including mayor--as when the government there was lily white and black people were disenfranchised. I'm not saying that antiblack discrimination has vanished; it hasn't, and there will always be bigots, of all colors, in a free society. But anyone who thinks that antiblack discrimination is the same problem in 2007 that it was in 1964 is delusional.

I hasten to add, Mr. Chairman, that of course none of this means that the Division is free to interpret the law in bad faith, or to set enforcement priorities, for partisan political purposes. But charges that the Division is doing so are serious indeed, and should not be made lightly. For Congress to do so, without strong evidence, is itself irresponsible, in addition to being demagogic. The examples that I've seen cited to date--invariably involving two cases under the Voting Rights Act--are unpersuasive; your hearings last fall, I think, showed as much, but let me briefly cover this ground again.

The first is a case where the Justice Department decided that a Georgia photo ID statute did not violate the anti-racial discrimination protections of Section 5 of the Voting Rights Act. Now, it is frequently asserted or reported, as proof of the untenability of the Division's decision, that--as a recently *Washington Post* article said--"The Georgia photo ID statute was struck down by a court." But the court struck it down, not under Section 5 and for its racial impact, but under other laws and not because of its racial impact—in other words, on issues not before the Division. And the case is still being litigated.

The second case involves redistricting in Texas. Here again, the Justice Department's action was based on Section 5, a different statute than the one the Supreme Court ruled on, which is Section 2 of the Voting Rights Act. The rationale for the court's ruling under Section 2 involves a criterion that is not considered under Section 5; in all events, the Court's ruling was close (5-4), and most of the challenged plan was upheld. On the Section 5 issue, the position that the Division took was exactly right, as I explained in a *National Review Online* article last year [link: http://www.nationalreview.com/comment/blum_clegg_thernstrom200601240829.asp].

Relationship between Political Appointees and Career Staff

This brings us to, and overlaps with, the relationship between political appointees and career lawyers (since in the Georgia and Texas cases the political appointees went against the recommendations of some--though not all--of the career lawyers). Here, too, I think it ought to be easy to agree on some basic boundaries.

On the one hand, no career lawyer should be penalized for partisan political reasons. What's more, most of the time political appointees should be eager to draw upon the institutional memory and expertise of the career staff. I know that I usually was when I was a deputy in the Division.

On the other hand, our government is a democratic republic, and the Executive Branch is accountable to the American people. Elections have consequences. That means that the President and his appointees have the responsibility and the right to run the Executive Branch—to set its priorities, to make the call on how to interpret the law (consistent with decisions by the Judicial Branch, of course), and even to decide which lawyers will best serve the Division's interests by most intelligently, enthusiastically, and resourcefully litigating its cases.

The picture that is frequently painted, moreover, of political hacks (ignorant of the law and interested only in winning political elections) overruling disinterested, white-lab-coat-wearing career lawyers is, to put it mildly, misleading. Political appointees, in my experience, are frequently at least as knowledgeable about the law as the career people whom they supervise (and, again, I have been on either side of the table); conversely, the career lawyers are frequently at least as partisan and ideological in their orientation. When there is friction between the two, I would not jump to the conclusion that it is the fault of the political appointees, or that they are showing an unprofessional lack of respect to the career lawyers, rather than vice versa.

Nor is it surprising--and it certainly doesn't prove illegal partisan hiring--when more conservatives are hired in a Republican administration and more liberals are hired in a Democratic administration. For starters, one would expect more conservatives to *apply* to Bush than to Clinton, and more liberals to apply to Clinton than to Bush. And while partisan bias is a no-no, looking for philosophical and policy compatibility is not. In the desegregation era, would Bobby Kennedy have wanted to retrain Jim Crow-loving applicants, or would he have given an edge to individuals passionately committed to destroying a separate-and-unequal status quo? Likewise, there's no reason why this administration should prefer not to hire lawyers whose briefs will have to be rewritten and who really aren't interested in working on, for instance, religious freedom cases.

With regard to hiring policy, by the way, I should note that the *New York Times* article I mentioned earlier said that "from 2003 through 2006, there was a notable increase of hirings from religious-affiliated institutions like Regent University and Ave Maria University." But the table that is included with the article shows that this "notable increase" was from zero per year at these schools to, occasionally, 1 per year (and, in only one instance, 2 hires); meanwhile, hires from Harvard were in double digits throughout most of the Bush administration--the only school that could claim that, and an actual increase from the Clinton administration.

Conclusion

Finally, Mr. Chairman, I must observe that, in my opinion, a big part of what's going on here is that disgruntled liberal lawyers are trying to influence policy by making miserable the lives of their conservative bosses or former bosses. It is no coincidence that some of those liberal lawyers leading the charge against the political appointees now have recently left the Division to work for liberal Democrats in Congress and organizations like the People for the American Way. Their targets are not political hacks; the average political appointee is, in my experience, a better lawyer than the average career staffer. In all events, the liberals are not white-lab-coat professionals (the Clinton administration's Civil Rights Division had to pay over $4.1 million in penalties for sloppy lawyering--see attached letter from the Justice Department to Representative Sensenbrenner).

Thank you again, Mr. Chairman, for the opportunity to testify today. I would be happy to try to answer any questions the Committee may have for me.

EMPLOYMENT ANTIDISCRIMINATION POLICIES IN THE CLINTON AND BUSH ADMINISTRATIONS

by Roger Clegg [paper presented at the University of Virginia "Policy History Conference" in June 2006]

Introduction and Scope

There are two federal agencies that enforce federal employment discrimination law through lawsuits. (In addition, the Department of Labor, pursuant to Executive Order 11,246, requires private companies contracting above a certain dollar amount with the federal government to refrain from discrimination and to have "affirmative action" programs.) The Justice Department's civil rights division brings lawsuits against public employers (state, county, and municipal governments and the like, including fire and police departments, for example); the Equal Employment Opportunity Commission brings lawsuits against private employers (so long as they have at least 15 employees).

This paper will focus on the civil rights division, since it is unclear whether there actually is a Bush administration EEOC. The EEOC considers itself a "quasi-independent agency," and, indeed, while the president does designate the chairman, he appoints commissioners only when their staggered five-year terms expire. The commissioners do not serve, then, at the pleasure of the president, and indeed by law no more than three of the five can be of the same political party. Accordingly, there need not be an immediate shift in the Commission's ideological orientation upon a change in administration. Furthermore, the Bush administration has been quite lackadaisical about filling Commission slots (and the slot for the Commission's general counsel). For all these reasons, the EEOC does not appear to be a promising place to look for making administration-to-administration comparisons.

With regard to the civil rights division, its employment antidiscrimination duties involve principally Title VII of the 1964 Civil Rights Act, 42 U.S.C. sec. 2000e et seq. (supplemented by the Equal Protection Clause of the Fourteenth Amendment, since generally the division's targets are public employers), and Title I of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. (It should be noted that the employment section is one of the division's nine sections; the others enforce civil rights laws in various other areas, such a voting, education, housing, and so forth.) I am going to focus in this paper on Title VII, and I have good reasons for doing so, but it would be possible, I think, to do an interesting paper on differences between the Clinton and Bush administrations with respect to ADA employment discrimination cases. I think there have been differences; candidly, however, it would have doubled the length of this paper to have considered the ADA, too, and I felt I had to pick one or the other and--again, candidly--I personally have been more interested in Title VII cases (particularly the ones involving race and ethnicity), and I think the differences between the two administrations have been more clear-cut with respect to Title VII than with respect to the ADA.

Title VII forbids discrimination on the basis of "race, color, religion, sex, or national origin." Cases in employment about "color" per se are rare. Religion cases are more common, but, interestingly, I do not think there are dramatic differences in the two administrations in this area, since both have been fairly hospitable to ensuring that employers (a) refrain from outright disparate treatment on the basis of religion, and (b) provide the "reasonable accommodation" that Title VII also requires employers to make for religious practice.

Most of the division's Title VII work, in any event, is about race, sex, and ethnicity. (The Supreme Court ruled early on that "national origin" means, essentially, ethnicity. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).)

One can classify the division's Title VII work further. There are "disparate treatment" cases and "disparate impact" cases, and there are "reverse discrimination" cases (i.e., those alleging discrimination against whites, or against males, or both) and "traditional" cases (alleging discrimination against minorities or women). Disparate treatment cases allege that the alleged victim was treated differently and worse because of his race, ethnicity, or sex. Disparate impact cases, on the other hand, attack an employment criterion of some sort (say, to give the classic instance, a high-school diploma) as having an unjustified and disproportionate result with respect to a protected category (say, African Americans)—and do not allege that the criterion is itself by its terms discriminatory, or was chosen in order to discriminate, or has not been applied evenhandedly to all groups.

Disparate treatment cases on behalf of women and minority groups carry no ideological baggage; there is no difference in the zeal with which they are pursued from administration to administration, nor should we expect there to be. To be sure, the remedies sought may vary (e.g., the use of quotas), and conservative administrations will be somewhat less willing to pursue exotic evidentiary theories. But no one has a problem with fighting actual discrimination against women and minorities, and any administration is only too happy to pursue such lawsuits.

This is not true, however, with respect to cases that allege discrimination against whites or males, and there is evidence—and one would suspect *a priori*—that this is also

not true with respect to disparate impact cases. The disparate impact approach inevitably pushes employers to abandon perfectly legitimate selection criteria and to ensure against liability by "getting their numbers right"--i.e., employing surreptitious quotas. *See* Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire* (2001) (National Legal Center for the Public Interest monograph); Roger Clegg, "The Bad Law of 'Disparate Impact,'" *Public Interest* (Winter 2000). (This is so, by the way, not only in employment, but in other areas, such as housing.) Conservatives dislike these two consequences more than liberals do. Thus, as we shall see, the Clinton administration did not like to bring reverse discrimination cases, which the Bush administration was sometimes willing to bring; and the Clinton administration appeared to be more willing to bring disparate impact cases than the Bush administration has been.

A word on methodology. The author has kept careful tabs on the filings of the civil rights division from May 1997 until the present; he worked in the first Bush administration, and was actually in the civil rights division there until July 1991 (and he continued to work on some civil rights matters even after that); from January 1993 until May 1997, he followed the civil rights activities of the Clinton administration, although not as closely as before and after this period. Nonetheless, the paper will procced in the most part anecdotally--or, if you will, qualitatively rather than quantitatively for its assessment--since numbers of filings alone would not be very illuminating (after all, times change, case law develops, not all cases are equal, and sometimes good results are achieved without a lawsuit).

Affirmative Discrimination Cases

I am going to label cases that challenge discrimination against nonminorities and men as "affirmative discrimination cases." They are frequently referred to as "reverse discrimination" cases, but I prefer the phrase coined by Nathan Glazer, because it is both more accurate and more stinging.

The Clinton administration's discomfort with such cases became apparent early on, in *Taxman v. Piscataway Township Board of Education.* The prior Bush administration had joined in a white female schoolteacher's lawsuit against her school board's decision to lay her off, rather than a black teacher, because of a desire to ensure greater faculty "diversity." The Clinton administration did not simply drop out of the case; it switched sides. For a discussion of the Piscataway case, see Terry Eastland, *Ending Affirmative Action: The Case for Colorblind Justice* 109-115 (1996).

The Piscataway flip-flop was dramatic and high-profile; usually the nudge toward quotas is much less overt. For instance, as I testified at division oversight hearings in 1998 (Testimony of Roger Clegg, Feb. 25, 1998 (emphasis in original), available at http://judiciary.house.gov/legacy/222323.htm.):

> probably few people noted that the Division signed a consent decree on April 14, 1997, which was filed in court on June 19, 1997, in its lawsuit against the Arkansas Department of Corrections (ADC) for sex discrimination in employment. Fewer still know about paragraph 5 of the consent decree, which requires the ADC to "seek in good faith to achieve the employment of women in correctional officer positions at correctional institutions housing male offenders *in numbers approximating their application for, and ability to qualify for, such positions. Absent explanation, the parties expect the ADC to hire women for entry-level [positions] ... at a rate that approximates the female applicant flow for such positions. ...It is also expected that the ADC will promote women ... at least in proportion to their representation in the class of qualified employees applying for promotion.*" Paragraph 6 then provides: "Failure to obtain a particular female applicant flow or hiring or promotion rate is not by itself a violation of this Decree, *but may prompt an inquiry by the United States.*" I suspect that no one

> has any doubt that these provisions are telling the ADC to meet its quota, or else. Assuming that it makes sense to have female prison guards in male prisons, there is still no justification for quota hiring. Incidentally, this case was pointed to by the administration's witness at your last oversight hearing as "[o]ne of the Division's most significant recent achievements ...." Of course, the administration did not mention the quotas.

The civil rights division took at similar position in its brief to the U.S. Court of Appeals for the Fourth Circuit in *United States v. State of North Carolina* (filed July 14, 1998) (asking for an order that the state department of corrections "seek to hire and promote women roughly in proportion to their representation in the pool of applicants qualified for hire or promotion").

There are other examples. The Clinton administration supported an unsuccessful challenge to the constitutionality of Proposition 209, a California ballot-initiative that banned state preferences in employment and other areas based on race, ethnicity, or sex (see Bill Lann Lee's February 25, 1998 testimony before the House Judiciary Subcommittee on the Constitution).

In at least one instance, the Clinton administration refused to act on an affirmative discrimination case--involving the Howard County, Maryland, police department, which was accused of "applying a different, higher cut-off score to evaluations of white male applicants than it was to female and minority applicants"--that had been referred to it by the EEOC. In its referral, the Commission was quite clear that something was amiss: It found that Howard County "admits to having treated minority and female candidates more favorably than white male candidates," and that, based on "the evidence obtained," "there is reasonable cause to believe" that Howard County "has engaged in a pattern and practice of discrimination" against the complainant and "white males as a class." Howard County, the EEOC concluded, "has violated Title VII of the Civil Rights Act of 1964 by

giving impermissible consideration to applicants' race and sex in making police officer selection decisions." But the division deliberated for 10 months and then told the complainant, without giving any explanation why, that "we will not file suit." See Roger Clegg, "Leeway on Bias Cases," *Washington Times*, Nov. 28, 1999, page B3.

On August 12, 1998, the division filed a brief in the U.S. Court of Appeals for the Second Circuit in *Hayden v. County of Nassau*, arguing that it was not a violation of Title VII to redesign a test deliberately so that fewer whites and more blacks will pass it. For a collection of division affirmative discrimination--and disparate impact--cases, filed just in 1998, see Roger Clegg & Clint Bolick, *Defying the Rule of Law: A Report on the Tenure of Bill Lann Lee, "Acting" Assistant Attorney General for Civil Rights* (February 1999). Things did not improve in 1999. See Roger Clegg, "Lee's Record at Justice," *Washington Times*, August 24, 1999 (the division, in the first half of 1999, "[e]ntered a settlement agreement in United States v. New York City Board of Education that included this provision: 'If the aforementioned test preparation sessions are oversubscribed, preferences will be given to black, Hispanic, Asian and women applicants'"; the division also "[e]ntered an agreement requiring race-conscious recruiting, hiring, and retention policies in Lee vs. Elmore County Board of Education").

The Bush administration, on the other hand, has been willing to defend the Title VII rights of men and nonminorities. Just within the last year, in widely publicized cases, it has successfully challenged graduate fellowships at Southern Illinois University under Title VII, on the grounds that they excluded men and certain non-underrepresented (overrepresented?) ethnic groups (like whites and Asians); and Langston University's

policy of paying black professors more than nonblack professors (a white female professor was the complainant).

It has also moved to amend or dismiss old consent decrees that contained affirmatively discriminatory quotas. For instance, according to an April 9, 2002 article in the *Los Angeles Times* ("Firefighter Hiring Quotas Ended," by David Rosenzweig): "The Justice Department's civil rights division and the Los Angeles city attorney's office, parties to the 1974 agreement [that "require[ed] that half of all Los Angeles firefighters be hired from the ranks of blacks, Latinos and Asians to alleviate racial disparities"], filed briefs in March asking the judge to scrap the racial hiring quotas." The division made a similar filing last year with respect to the Indianapolis police and fire departments. Editorial, *Indianapolis Star*, October 13, 2005.

Other anti-affirmative discrimination actions by the civil rights division in the Bush administration include a July 26, 2005 challenge to fire department dual lists filed against the City of Pontiac, Michigan; a July 29, 2003 consent decree against Greenwood Community School Corp. in Indiana; and an October 1, 2001 consent decree against the City of Bastrop, Louisiana.

Additional evidence that there was a clear difference in enforcement philosophy in this area between the two administrations can be drawn from the nonemployment context--most dramatically, the University of Michigan cases involving affirmative discrimination in student admissions. The Clinton administration filed an amicus brief in the lower courts defending the university's discrimination; before the Supreme Court, the Bush administration took the position that the discrimination was illegal. (The Supreme

Court, of course, split the baby in two, upholding the law school's discrimination but striking down the undergraduate admissions policy.)

The Clinton administration also had defended the University of Washington law school's affirmative admissions discrimination in *Smith v. University of Washington Law School*, Nos. 99-35209 et seq. (filed in the U.S. Court of Appeals for the Ninth Circuit on Sept. 16, 1999), and supported race-based student assignments at the K-12 level (e.g., in amicus briefs filed on July 21, 1998 with the U.S. Court of Appeals for the Fourth Circuit in *Tuttle v. Arlington County School Board*; in 1999 in another Fourth Circuit case, this one in Maryland, *Eisenberg v. Montgomery County Public Schools*; and in the Second Circuit on April 22, 1999 (No. 99-7186) in *Brewer v. West Irondequoit Central School District*).

The Bush administration, on the other hand, has been willing to challenge antiwhite harassment under the Voting Rights Act (*United States v. Brown*, No. 4:05 CV 33 TSL-AGN (S.D. Miss. 2-17-05)).

As the careful reader may glean from the foregoing lists, it is not so much that the Bush administration has filed a large number of anti-affirmative action cases (in any context), but that at least it has been willing to file *some*, and has been unwilling to defend affirmative discrimination. I am aware of only one instance in which the Clinton administration filed a brief opposing affirmative discrimination; in the summer of 1998, it did so in Maryland federal district court, in *United States v. New Baltimore City*, on behalf of a white applicant for middle-school assistant principal; even here, however, it might have been motivated more out of a desire for racial homogeneity in the school system than simple nondiscrimination. (As noted above, however, my really close

monitoring of the division's filings in the Clinton administration did not begin until 1997, so it is possible that it defended a white or male or two before then.) And, of course, it was quite aggressive in defending such affirmative discrimination.

Disparate Impact Cases

As noted, we would expect there to be more enthusiasm in a liberal administration than in a conservative administration for disparate impact cases. And that is apparently the case.

The House Judiciary Committee's Subcommittee on the Constitution devoted a substantial part of two oversight hearings to testimony that the Clinton administration was bringing abusive disparate-impact employment cases. In May 1997, it heard testimony "about the Division's abuse of disparate impact theory in its challenges to the use of written exams by police and fire departments," focusing in particular on its lawsuit against the Torrance, California, police and fire departments. On February 25, 1998, there was similar testimony about the division's lawsuit against Garland, Texas. Testimony of Roger Clegg, Feb. 25, 1998, available at http://judiciary.house.gov/legacy/222323.htm.

Other examples of Clinton administration disparate-impact challenges include *United States v. New York City Board of Education* (E.D.N.Y. settlement agreement dated Feb. 11, 1999) (disparate-impact challenge to school-custodian test); *United States v. City of Belleville*, No. 93-CV-0799-PER (S.D. Ill. 1998) (disparate-impact challenge to written and physical tests for firefighters and police); *Pietras v. Board of Fire Commissioners of the Farmingville Fire Dist.*, No. 98-7334 (amicus brief filed in the U.S. Court of Appeals for the Second Circuit on Jan. 20, 1999) (challenging disparate-impact

on women of firefighter physical-fitness requirements). On the aggressive stance of the Clinton administration with respect to the disparate-impact approach generally (in employment and nonemployment contexts), see my *Public Interest* and NLCPI pieces, *supra*; and Roger Clegg, "Distorting 'Equal Opportunity,'" *Regulation*, Summer 2001, pp. 44-45.

The division was also criticized when it "sued the Philadelphia area's regional transit police for discriminating against female applicants by requiring them to be able to run 1.5 miles in less than 12 minutes." Testimony of Roger Clegg, Feb. 25, 1998, available at http://judiciary.house.gov/legacy/222323.htm. In this litigation, the division took the position that this requirement was "unrelated to job performance" and that there should be different standards for men and women. *Id.*

The division dropped out of this lawsuit during the first year of the Bush administration. The decision to do so, which was announced just after September 11, 2001, was made easier by the events of that day, which made it unappealing to argue that some minimum level of physical conditioning is desirable for police officers. A division spokesman said, "We feel it is critical to public safety that police and firefighters be able to run, climb up and down stairs to rescue people quickly under the most trying of circumstances." Quoted in Roger Clegg, "Tripped Up," *Legal Times*, February 18, 2002, page 36.

There have been, accordingly, fewer disparate-impact employment cases filed under the Bush administration (and, in the nonemployment context--in housing, for instance--it has also been less willing to push the outside of the disparate-impact envelope). This does not mean, however, that the Bush administration never brings

disparate-impact challenges, even to police and firefighter requirements. It recently won a case against Erie, Pennsylvania, in which it had claimed that the city's physical fitness test for police officers--in particular, the push-up and sit-up components to it--had an illegal disparate impact on women. Department of Justice press release, dated December 14, 2005, available at http://www.usdoj.gov/opa/pr/2005/December/05_crt_667.html.

Conclusion

I have noted in the past that there are four basic differences on principles and law that separate relatively liberal administrations (like Clinton's) and relatively conservative ones (like Bush's) when it comes to civil rights enforcement. Roger Clegg, "Do the Right Thing," *Legal Times*, February 19, 2001. I've discussed two of them here: Conservatives are more willing to challenge affirmative discrimination, but less enamored of disparate-impact lawsuits. The other two differences involve federalism and the free market: Conservatives are more sensitive to federal-versus-state divisions of power and competence, and more skeptical about the government second-guessing economic decisions made by the private sector.

I should conclude by saying that it is not necessarily a bad thing that enforcement policies should differ from administration to administration. The executive branch should not urge interpretations of the law that it does not itself believe are a fair reading of the underlying statutory or constitutional texts, and in particular it should not be influenced by simply small-p political considerations. But there are legitimate differences in how to interpret statutes among enforcement officials, just as there are among judges.

Moreover, even if two officials interpret a statute the same way, they might not be equally zealous in enforcing it. Law enforcement agencies have finite resources, and they must set priorities. Those priorities may change over time; antiblack discrimination might be a greater problem in 1964 than 2006, and anti-Muslim discrimination may be a bigger problem in 2006 than in 1964, for instance. Moreover, officials may just believe that certain kinds of discrimination threaten society more than others; one administration might be more upset about sex discrimination in the workplace, another by race discrimination in housing.

Elections have consequences, as they should. Roger Clegg, "Marching Orders," *Legal Times*, April 29, 2002.

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TESTIMONY OF ROBERT N. DRISCOLL ON OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S CIVIL RIGHTS DIVISION BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

June 21, 2007

Thank you, Mr. Chairman and members of the Committee for the opportunity to discuss the work of the Civil Rights Division. My name is Bob Driscoll and I am currently a partner at Alston & Bird LLP, here in Washington. From 2001 to 2003, I had the honor of serving as Deputy Assistant Attorney General in the Civil Rights Division. During that time I worked on a variety of issues, including racial profiling guidance to federal law enforcement, desegregation, and police misconduct.

While this testimony was prepared in advance of the hearing, and therefore prior to hearing the issues the Committee discusses with Assistant Attorney General Kim, I testified at the November 16, 2006 hearing before this Committee and think I have some idea of the issues likely to be discussed – in particular the proper working relationship between political appointees and career staff, how enforcement priorities are set within the Civil Rights Division, and whether the Division has performed its enforcement functions with sufficient vigor during the course of this Administration. I will comment briefly on each of these issues prior to answering whatever questions the Committee might have.

Relationship between "Career" and "Political" Employees

There has been a good deal of media attention paid to this issue in recent weeks, but nearly every news story I have seen has focused on allegations that career Civil Rights Division employees were "overruled" or "interfered with" by political appointees when the Division took a particular position in litigation or with respect to a pre-clearance decision under Section 5 of the Voting Rights Act. While I obviously am familiar only with my own experience in the Division, I sense that these types of stories misperceive the proper relationship between career and political staff.

As in every Division of the Department, in the Civil Rights Division, the career staff carries out the day-to-day operations of the Division, litigates existing cases, and makes recommendations to open new cases. There is no question that the career staff is where the institutional knowledge of the Division generally resides and is a resource that any appointee should draw upon frequently. However, it is the Assistant Attorney General for Civil Rights and the leadership of the Department who are ultimately responsible for the actions of the Division. This is a tremendous responsibility for the AAG and his or her immediate staff – as it is the AAG who will sit before this Committee and explain the Division's position on controversial issues.

Because of this responsibility, the AAG and his or her staff must independently review, and therefore will sometimes disagree with, the recommendations of career staff. There is nothing inherently wrong with this – indeed, I think the Committee would not

react well to an Assistant Attorney General who testified that he reached no conclusions that differed in any way from the recommendations presented to him. Such a "rubber-stamp" approach would be, and should be, justly criticized.

Similarly, when the Division makes a mistake – as it did in Torrance, California when it was sanctioned nearly 1.8 million dollars for overreaching in an employment case – it would be no excuse for the AAG to say: "I was merely following the recommendations of the career staff." Therefore, it is the responsibility to "get it right" that obligates the AAG and his or her staff to closely scrutinize the recommendations that come before them.

It therefore seems to me that the important question the Committee should focus on is not whether a particular decision to proceed (or not) with a case was made with the political and career staff in agreement, but whether the decision was correct. And from what I have seen, courts have largely agreed with the positions taken by AAG Kim and his predecessors. Members of this Committee may disagree with those positions, and vigorous questioning of Department officials about them is entirely appropriate, but there is little indication from the courts that, on the whole, the positions of the Division have been anything other than well-grounded in both law and fact. And that, it seems to me, is more important that the narrow process question of whether career staff did or did not agree with a given position taken by the Division.

Setting Priorities

A related issue involving the Division's political appointees is the formation of enforcement priorities for the Division. In particular, the Division's emphasis on human trafficking prosecutions and religious discrimination cases has been criticized in some quarters, most recently in the New York Times, as a shift away from "traditional" civil rights enforcement. Once again, I think these criticisms are largely unfounded, and take an unnecessarily cramped view of the role of the Civil Rights Division.

As an initial matter, new statutes passed at the close of the Clinton Administration provided new weapons to combat both religious discrimination and human trafficking, so enforcement in these areas was bound to increase regardless of the administration. More importantly, however, President Bush, and Attorney General Ashcroft, under whom I served, made clear that combating religious discrimination was a priority and that resources should be directed to make sure that enforcement was vigorous. Once again, some may disagree with their view, but it is clearly within the authority of the Department to set priorities for the Civil Rights Division.

While I served in the Division, I and others worked hard to make sure that religious discrimination cases were a priority. The position of Special Counsel for Religious Discrimination was created to coordinate these cases and Eric Treene has done a spectacular job in that role. The Division's success rate in these types of cases is high – unfortunately there is no shortage of governmental entities that lack an understanding of the rights of people of all faiths (and people of no faith) under our Constitution and laws.

I think most Americans are pleased to see the Civil Rights Division's vigorous actions in this area, and there is certainly nothing about the emphasis placed on these cases while I was at Civil Rights, or the specific positions taken by the Department, that I regret.

Some have expressed concern that emphasizing religious discrimination cases necessarily de-emphasizes what they view as "traditional" civil rights cases involving racial discrimination in public employment or voting. My experience is that the structure of the Division makes this unlikely – the Voting and Employment sections have very little, if anything, to do with most religion cases and the resources used to bring these cases are provided from other parts of the Division (generally the Housing and Education sections). If members of this Committee have concerns about what types of cases are or are not being brought by these sections, it is certainly fair to raise them, but any such analysis or discussion should be, in my mind, independent of the religious discrimination and human trafficking cases. If it were true that an increase of emphasis on non-race-based areas of civil rights truly undermined enforcement of racial discrimination statutes, the importance of disability cases, language-minority cases, police misconduct cases, clinic access cases, prison cases, juvenile facility cases, gender discrimination cases and religious discrimination cases would all be de-emphasized. But vigorous enforcement in all of these areas is part of the Civil Rights Division's mission, and we should avoid any suggestion that enforcement of in any one of these areas comes at the expense of any other.

Enforcement Record

I will let AAG Kim defend himself and the Division's record in this regard, as he will have the most recent information for the Committee. I would like to comment, however, on a criticism that I have heard frequently – that the Division only filed "x" number of cases in a particular area. I can think of few worse measures of whether the Division is doing its job in a given area that the number of "cases filed" and would like to provide a few examples.

First, when I was at the Division, I supervised abortion clinic access cases. I don't recall ever approving a new case under that statute – but that was because I was never asked to because the statute had, in effect, worked. Existing cases had the most prolific violators of the statute under injunction already and no new cases were brought to my attention. Thus, one looking at the "cases filed" statistic might conclude that there was some hostility to the statute when in fact, there was not.

Second, during my tenure at the Division we entered into memoranda of understanding or other resolutions achieving reforms in police departments in numerous cities. Because no lawsuit was filed, these successes would never be captured in a "cases filed" analysis.

Finally, "cases filed" is less important than "cases won" or resolutions achieved. If a problematic voting practice or hiring standard is changed without the expense of litigation, the Division deserves credit, not criticism. None of this is to say that this

Committee should not probe vigorously if it fears that certain types of cases are being ignored or that discrimination is going unpunished, but, such conclusion cannot be reached merely by referring to the number of cases filed by the Division.

Thank you for the opportunity to appear before the Committee and I look forward to answering whatever questions the Committee may have.

Statement Of Sen. Patrick Leahy,

Today I will ask the Committee to provide the authorization to issue subpoenas for documents relating to the National Security Agency's warrantless domestic electronic surveillance program. This is an authorization I first circulated two weeks ago and that was formally held over by Senator Kyl last week.

For more than five years this Administration intercepted conversations of Americans in the United States without obtaining court orders under the Foreign Intelligence Surveillance Act (FISA). This program became public in December 2005 and, soon after, the President confirmed its existence. Since then, this Committee has sought information about the authorization of and legal justification for this program time and again – in letters, at hearings, and in written questions. Yet, this Administration has rebuffed all requests. Last month, Senator Specter and I wrote again to Attorney General Gonzales requesting these documents. We have still received no documents and no explanation.

This stonewalling is unacceptable and it must end. If the Administration will not carry out its responsibility to provide information to this Committee without a subpoena, we will issue one. If we do not, we are letting this Administration decide whether and how the Congress will do its job. The Judiciary Committee is charged with overseeing and legislating on constitutional protections and the civil liberties of Americans, and the warrantless electronic surveillance program directly impacts these responsibilities.

Instead of responses, our attempts to get straight answers from the Administration have met with stubborn refusals of our legitimate oversight requests. This is information we need, we should have, and whose production is long overdue. We are asking not for intimate operational details but for the legal justifications and analysis underlying these programs that affect the rights of every American.

When we held our first hearing with Attorney General Gonzales about this program, on February 6, 2006, he refused to answer simple questions or discuss anything more than "those facts the President has publicly confirmed." He defended the program as "necessary" and "very narrowly tailored," but he refused to back up these self-serving conclusions. He asserted that the Authorization for the Use of Military Force passed after September 11 authorized this warrantless wiretapping of Americans, yet would not even tell me *when* the Justice Department had come up with this particular legal justification. This pattern of evasion has continued with every hearing, every letter, and every written response.

Last month, we heard deeply troubling testimony from former Deputy Attorney General James Comey about a dispute over the legality of the warrantless electronic surveillance program. When the senior Department of Justice leadership refused to certify the legality of the program, the White House – including the then-Counsel to the President, Mr. Gonzales – attempted to strong-arm an ailing Attorney General Ashcroft in his hospital bed. When that did not work, they decided simply to ignore the law and authorize the

program anyway. Only the prospect of a mass resignation of virtually every senior officer in the Department of Justice, including the FBI Director, caused the President to relent.

Yet, when Attorney General Gonzales was asked at that February 6, 2006, hearing before this Committee whether senior Justice Department officials expressed reservations about the NSA warrantless surveillance program, he responded, "I do not believe that these DOJ officials . . . had concerns about this program." The Committee and the American people deserve better.

There is no legitimate argument for withholding these materials from this Committee. There is abundant precedent for providing Executive Branch legal analysis to the Congress, particularly to this Committee. Indeed, volumes upon volumes of Attorney General and Office of Legal Counsel legal opinions have even been made public. Sometimes in previous Administrations a particularly sensitive subject has resulted in an accommodation between branches on the manner in which it was shared. But this Administration has no policy of accommodation. Its policy is to deny and to stonewall. Neither is the fact that the matters involve classified information a reason to withhold these legal documents. Congress receives sensitive classified information regularly.

Why has this Administration been so steadfast in its refusal? Deputy Attorney General Comey's account suggests that some of these documents would reveal an Administration perfectly willing to ignore the law. Is that what they are hiding?

When the Department of Justice's own Office of Professional Responsibility (OPR) began an internal investigation into the conduct of Department of Justice attorneys who approved this program, Attorney General Gonzales and the White House shut them down by denying them the necessary clearances. The head of OPR noted when he was forced to stand down that in its 31-year history OPR had never before been prevented from pursuing an investigation. Senators Durbin, Kennedy, Feingold, and Whitehouse have diligently sought documents on this series of events many times, but, again, have received no response.

Finally, I will note that this Administration is now asking Congress to make sweeping changes to FISA – a crucial national security authority over which this Committee has jurisdiction. The White House wants us to agree to far-reaching changes to that authority, but the Administration stubbornly refuses to let us know how it interprets the current law and the perceived flaws that led it to operate a program outside of the process established by FISA for more than five years. This legal analysis is information the Committee must have in order to make informed legislative decisions. As the Supreme Court said in *McGrain v. Daugherty,* "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."

Whatever the reason for the stonewalling, this Committee has stumbled in the dark for too long, attempting to do its job without the information it needs. We need this

information to carry out our responsibilities under the Constitution. Unfortunately, it has become clear that we will not get it without a subpoena. I urge the adoption of the subpoena authorization.

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Statement
United States Senate Committee on the Judiciary
Civil Rights Division Oversight
June 21, 2007

The Honorable Patrick Leahy
United States Senator , Vermont

Statement of Senator Patrick Leahy,
Chairman, Judiciary Committee,
on Department of Justice Civil Rights Division Oversight
June 21, 2007

For almost 50 years, the Civil Rights Division has stood at the forefront of America's march toward equality. Founded in 1957, the Division vigorously implemented civil rights laws during the turbulent era of the Civil Rights Movement. Its attorneys participated in landmark cases that helped transform the legal landscape of our country and brought us closer to the ideal of a "more perfect union." These cases included successfully prosecuting the murderers of civil rights workers, eliminating voter disenfranchisement laws, and battling discrimination in education and government services throughout the nation.

Several reports from former career attorneys in the Division highlight how the current Administration has abandoned the priorities upon which the Civil Rights Division was founded. New evidence continues to emerge demonstrating that President Bush's political appointees have reversed longstanding civil rights policies and impeded civil rights progress. There are disturbing reports that career lawyers have been shut out of the Division's decision-making process, that the Division's civil rights enforcement on behalf of racial minorities has sharply declined, and that the Department has packed the Division with attorneys who have no background in civil rights litigation.

Of the many stories about corrosive political influences affecting our government, the reports of the politicization of the justice department's Civil Rights Division are some of the most disappointing. After all, this law enforcement Division is entrusted with defending our most precious rights as Americans, including our fundamental right to vote and our rights against discrimination. I am deeply troubled by what appears to be an effort by the White House to manipulate the Justice Department into its own political arm.

About a year ago, President Bush signed into law the reauthorization of the Voting Rights Act (VRA). Although a broad bipartisan coalition of members of Congress supported reauthorizing this cornerstone of civil rights laws, how it is enforced by the Justice Department and its Civil Rights Division will determine whether it will continue to protect Americans against voter disenfranchisement.

Investigative reporting appearing in the Boston Globe, the Washington Post and other papers has chronicled this Administration's political makeover of the civil rights division. In the Voting Section alone, more than 20 attorneys, representing about two-thirds of the lawyers in the section, have left in the last few years – over a dozen have left the section in the last 15 months. Included in this talent drain were the chief of the section, three deputy chiefs, and many experienced trial lawyers, representing almost 150 years of cumulative experience in civil rights enforcement. In addition, recent reports highlight the departures of a large percentage of analysts who review pre-clearance petitions under tight time pressure. I look forward to learning more about the latest allegations about personnel issues in the Division from the Assistant Attorney General's testimony today.

The departures are not my only cause for concern. As we have learned from previous Committee testimony, the Bush Administration's political appointees implemented a major policy change in its hiring process. Until 2002, hiring for career jobs in the Civil Rights Division under all administrations, Democratic and Republican, had been handled by civil servants, not political appointees. After the Bush Administration disbanded the hiring committees – comprised of veteran career lawyers – a noticeable shift in backgrounds of its attorneys emerged. According to internal documents obtained by the Boston Globe, "only 42 percent of the lawyers hired since 2003 . . . have civil rights experience" which is a downward turn as compared to two years before the change where "77 percent of those [] hired had civil rights backgrounds." The Civil Rights Division apparently hired lawyers with strong conservative credentials but little experience in civil rights. This reminds me of the same hiring philosophy that brought us the disastrous aftermath of Katrina but with further revelations from former employees, it is clear that more than mere cronyism was at work.

It should come as no surprise that the result, and of course the intent, of this political makeover of the Civil Rights Division has resulted in a dismal civil rights enforcement record. I look forward to receiving additional testimony today about how enforcement of the laws that Congress passed to protect Americans are no longer being enforced by the current Justice Department.

As the Committee responsible for overseeing the Justice Department, we must ensure that the Department is upholding its duty to protect the American people -- all the people -- from discrimination. Our civil rights laws provide our Federal Government with the authority to impose criminal and civil sanctions against individuals and institutions that violate our peoples' civil rights. They provide meaning to our constitutional guarantees. If civil rights laws are ignored – particularly by the federal agency charged with their enforcement – discrimination will flourish, and the consequences for our nation will be great.

The American people deserve a strong and independent Justice Department with leaders who enforce the law without fear or favor. Every week brings new revelations about the erosion of independence at the Justice Department. This Administration was willing, in the U.S. Attorney firings and in the vetting of career hires for political allegiance, to sacrifice the independence of law enforcement and the rule of law for loyalty to the White House. We know that one of the lead political appointees serving in the Civil Rights Division was the first U.S. Attorney to be appointed by the Attorney General under new powers granted to him in the PATRIOT Act. It certainly appears that Mr. Schlozman was put in that district to infuse the White House's brand of politics into the law enforcement agency of battle ground state before what was expected to be a close national election. In fact, during his brief tenure he brought two controversial election law cases. I expect we will continue to learn more about what Justice Department rules and policies were broken by Mr. Schlozman as new evidence comes to light.

I look forward to receiving the testimony of Professor Brian Landsberg. Professor Landsberg literally wrote the book on the Civil Rights Division, entitled "Enforcing Civil Rights: Race Discrimination and the Department of Justice," so I expect his testimony to reveal how the current Division is performing in light of the purpose and historical performance of the division under several different presidents. Also joining us today is Professor Helen Norton. She will explore the important role the Division has played in past employment discrimination cases and how the current administration has departed from this legacy with its advocacy in two disappointing Supreme Court cases. We welcome back Wade Henderson, President and CEO of the Leadership Conference on Civil Rights, an expert in the field of civil rights and a keen observer of the changes that have taken place in the Division since President Bush took office six years ago. I look forward to receiving your testimony and I thank

Senator Cardin for agreeing to Chair this important hearing this afternoon.

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Testimony of

Wade Henderson
President and CEO
Leadership Conference on Civil Rights

before the

Senate Judiciary Committee
Oversight of the Civil Rights Division
June 21, 2007

"Equality In a Free, Plural, Democratic Society"

Hubert H. Humphrey Civil Rights Award Dinner • May 10, 2007

Good Morning. My name is Wade Henderson and I am the President and CEO of the Leadership Conference on Civil Rights. The Leadership Conference is the nation's premier civil and human rights coalition, and has coordinated the national legislative campaigns on behalf of every major civil rights law since 1957, including the work to pass the historic 1957 Civil Rights Act which created the Civil Rights Division 50 years ago this fall. The Leadership Conference's almost 200 member organizations represent persons of color, women, children, organized labor, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups. It's a privilege to represent the civil rights community in addressing the Committee today.

In recent weeks, more and more news reports have revealed that the Civil Rights Division has abandoned its long tradition of fair and vigorous enforcement of our nation's civil rights laws.[1] Partisanship, it seems, has been driving both substantive and personnel decision-making. In its 50 year history, never before has the Civil Rights Division faced such a challenge. In those 50 years, through both Republican and Democratic administrations, the integrity of the Division has never been questioned to this degree. Not even close. Members of the committee, we must turn this ship. We must expect a Civil Rights Division that enforces the nation's civil rights laws, without fear or favor. We must demand accountability and a return to vigorous enforcement.

These revelations, and others indicating that the U.S. Department of Justice may have fired eight U.S. U.S. Attorneys to further a political agenda[2] were surprising to many; to those of

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[1] Gordon, Greg. "Justice Officials Accused of Blocking Suits into Alleged Violations." McClatchy Newspapers. 18 June 2007; Hamburger, Tom. "Minnesota Case Fits Pattern in Flap over Firing of U.S. Attorneys." Los Angeles Times. 31 May 2007; Lewis, Neil. "Justice Dept. Reshapes its Civil Rights Mission." The New York Times. 14 June 2007; Savage, Charlie. "Justice Dept. Probes its Hirings." Boston Globe. 31 May 2007.

[2] Lipton, Eric and David Johnston. "Gonzales's Critics See Lasting, Improper Ties to White

us who have been watching the Civil Rights Division, they were not. Over the last six years, we have seen politics trump substance and alter the prosecution of our nation's civil rights laws in many parts of the Division. We have seen career civil rights division employees – section chiefs, deputy chiefs, and line lawyers -- forced out of their jobs in order to drive political agendas.[3] We have seen retaliation against career civil servants for disagreeing with their political bosses.[4] We have seen whole categories of cases not being brought, and the bar made unreachably high for bringing suit in other cases. We have seen some outright overruling of career prosecutors for political reasons,[5] and also many cases being "slow walked," to death.

And the problem continues.

This year, to commemorate the 50th anniversary of the creation of the Civil Rights Division, the Leadership Conference on Civil Rights Education Fund plans to issue a comprehensive report on the work of the Division over the past ten years. This report is being developed in conjunction with many of our member organizations, including the Lawyers'

House." The New York Times. 15 March 2007. <http://www.nytimes.com/2007/03/15/washington/15justice.html>

Eggen, Dan and John Solomon. "Firings Had Genesis in White House: Ex-Counsel Miers First Suggested Dismissing Prosecutors 2 Years Ago, Documents Show." The Washington Post. 13 March 2007: A01.

Johnston, David. "Justice Dept. Names New Prosecutors, Forcing Some Out." The New York Times. 17 January 2007. <http://www.nytimes.com/2007/01/17/washington/17justice.html?ex=1174536000&en=585b767248eb6b75&ei=5070>

[3] Savage, Charlie. "Civil Rights Hiring Shifted in Bush Era: Conservative leanings stressed." Boston Globe. 23 July 2006.
[4] See Testimony by Joe Rich, House Judiciary Committee, March 22, 2007
[5] Eggen, Dan. "Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination." The Washington Post. 17 November 2005: A01; Eggen, Dan. "Justice Staff Saw Texas Districting As Illegal: Voting Rights Finding On Map Pushed by DeLay Was Overruled." The Washington Post. 2 December 2005: A01.

Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, People for the American Way, Mexican American Legal Defense and Educational Fund, Asian American Justice Center, NAACP, National Partnership for Women and Families, National Fair Housing Alliance, American Association of Persons with Disabilities, National Disability Rights Network, American Civil Liberties Union, Anti-Defamation League, National Council of La Raza and many others. The following is a brief description of some of the report's preliminary findings.

In general, the concerns that we have with the enforcement within the Civil Rights Division fall into three broad categories: (1) a significant drop off in the number of cases brought overall; (2) a shifting of priorities away from traditional enforcement areas, where the Division has long played a unique and significant role, and (3) politicization of personnel decisions and substantive decision-making within the Division.

Reduced Level of Enforcement

Over the last six years, the Civil Rights Division has brought fewer cases across the board. In the area of employment, since January 20, 2001, the Bush Administration has filed just 35 Title VII cases, or an average of approximately six cases per year. This number includes five cases in which the DOJ intervened in ongoing litigation and two cases initiated by the U.S. Attorney's Office for the Southern District of New York (using its own resources). By comparison, the Clinton Administration filed 34 cases in its first two years in office. By the end of its term in office, the Clinton Administration had filed 92 complaints of employment discrimination or more than eleven cases per year.

Similar trends can be seen in the work of the Housing and Civil Enforcement Section. Since 2001, the number of cases the Section has filed overall has fallen precipitously from 53 in

2001 to 31 in 2006. One major drop off in case handling has been with cases involving allegations of race discrimination. Since 2001, the number of race cases the Section has filed has fallen by 60 percent (from 20 to 8). There has also been a precipitous decline in the number of testing cases filed in the past four years especially.

Shifting Priorities

On the issue of priorities, the Employment Litigation Section has filed few cases on behalf of African Americans in recent years. In fact, the Section has directed a portion of its precious resources to "reverse discrimination" cases on behalf of white individuals. In other cases, the Section abandoned well-established government positions. In two recent Supreme Court cases, the Solicitor General refused to defend the longstanding legal positions of the Equal Employment Opportunity Commission, opting instead for a more restrictive reading of Title VII. In these cases, the Employment Section either failed to advocate for the EEOC's position or was ineffective in attempting to direct policy toward aggressive enforcement.

In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination (HUD HUB Directors' meeting Rhode Island 2003). DOJ's decision was a sharp break from DOJ's decades-long, bipartisan policy to aggressively litigate these cases.

Disparate impact cases are crucial in the fight against housing discrimination. Many rentals, sales, insurance, and related policies are not discriminatory on their face, but have a disparate impact on members of protected classes. Among those that are more subtly discriminatory, some have a discriminatory *intent* and others have a discriminatory *impact*. Even though there may not be any intent in the policy, it can have just as detrimental an effect on individuals and families trying to find housing. Examples of disparate impact include: (1) a limit on the number of persons per bedroom to one, which has a disparate impact against families with

children, and (2) a minimum loan or insurance amount, which has a disparate impact against properties in minority neighborhoods. The federal government is often the only entity with the capacity to investigate and litigate such fair housing complaints.

The Voting Section did not file any cases on behalf of African American voters during a five-year period between 2001 and 2006 and no cases have been brought on behalf of Native American voters for the entire administration. In addition, during the same five-year period, the Department only filed one case alleging minority vote dilution in violation of Section 2 of the Act. Section 2 vote dilution cases are particularly important because the end result – an election system that enables minority voters to have an equal opportunity to elect its candidates of choice – has a significant positive impact on minority voters. During this 5 year period, the only racial discrimination case brought by the Division under Section 2 of the Voting Rights Act was on behalf of *white* voters in Noxubee, Mississippi.

According to the New York Times[6], this administration has brought far fewer hate crimes and police abuse cases, compared to its predecessors. Instead, there has been a focus on the investigation of trafficking cases, typically involving foreign women used in the sex trade. While these trafficking cases are serious and important, they had previously been handled by the Criminal Division at Justice. It is unclear why they now appear to take precedence over the Division's more traditional criminal cases. On some level, the issue is not whether the Civil Rights Division should be involved in trafficking cases. The question is whether they should be doing so at the expense of their prosecution of hate crimes and police abuse cases.

Furthermore, the Department has gone out of its way to take legal positions that have restricted civil rights. For example, the Division filed an *amicus curiae* brief in a 2004 Michigan case involving provisional ballots where the government argued that the Help America Vote Act

[6] Lewis, Neil. "Justice Department Reshapes its Civil Rights Mission." The New York Times. 14 June 2007.

permitted states to reject provisional ballots solely on the basis that the voter did not cast the ballot in the proper precinct. Last year, the Department also filed *amicus* briefs in support of the dismantling of voluntary school integration programs in Seattle, Washington and Louisville, Kentucky. These cases, which challenge one of the few ways left for local school districts to battle segregation in public schools, are currently pending before the Supreme Court. In the employment context, the Division unsuccessfully sought to dismiss a case in the middle of litigation, which would have permitted the employer to use a discriminatory and invalid selection test.[7]

These filings, and many others, illustrate hostility toward the goals of effective civil rights enforcement for minorities across the country.

Politicization of the Division

In the Voting Section, several decisions appear to have been made in which political considerations trumped the Civil Rights Division's obligation to enforce the Voting Rights Act. In 2002, the administration intentionally delayed making a determination on a Mississippi Congressional plan drawn by a state appellate court so that a plan that favored Republicans drawn by federal judges would be used instead.[8] In 2003, the political appointees disregarded a recommendation that a Texas Congressional redistricting plan be objected to because it resulted in the retrogression of minority voting strength.[9] That plan was later struck down, on other

[7] *United States v. Buffalo Police Department*, No. 73 CV-414 (W.D.N.Y.).
[8] Rosenbaum, David E. "Justice Dept. Accused of Politics in Redistricting." The New York Times. 31 May 2002: A14.
[9] Eggen, Dan. "Justice Staff Saw Texas Districting As Illegal: Voting Rights Finding On Map Pushed by DeLay Was Overruled." The Washington Post. 2 December 2005: A01; Section 5 Recommendation Memorandum, December 12, 2003 re: House Bill 3 (Congressional Redistricting Plan Enacted by the Texas Legislature) (2003-3885) and House Bill 1 (Extension of congressional candidates filing period, moving primary election date, procedures for canvassing, late counting of ballots) (2003-3917). http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf, last viewed March 20, 2007.

grounds, by the Supreme Court.[10] In the weeks leading up to the November 2004 general election, political appointees in the Division prevented the Civil Rights Division from investigating serious allegations of voter discrimination against Native Americans in Minnesota.[11]

Perhaps the most infamous of these examples occurred in 2005, when the administration precleared Georgia's government-issued photo identification law despite numerous comment letters outlining the impact that the law would have on minority voters and over the recommendation of an objection from the majority of the staff who worked on it.[12] Recent testimony and communications from career staff involved in this case make clear that the decision to preclear the Georgia voter ID bill was predetermined and political.[13] The law was later found unconstitutional by state and federal courts, one of whom likened it to a Jim Crow era poll tax.[14]

Compounding all of these problems are the major changes in personnel across the Division that have resulted in the loss of dedicated career staff, low morale, and a decrease in productivity.

Changes in Administration have often brought changes in priorities within the Division, but these changes have never before challenged the core functions of the Division. And never before has there been such a concerted effort to structurally change the Division by focusing on personnel changes at every level.

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[10] *League of United Latin American Citizens v. Perry*, 547 U.S. (2006)
[11] Hamburger, Tom. "Minnesota Case Fits the Pattern in Flap Over Firing of U.S. Attorneys." Los Angeles Times. 31 May 2007.
[12] Section 5 Recommendation Memorandum, August 25, 2005 re: Act No. 53 (H.B. 244) (2005). http://www.washingtonpost.com/wp-srv/politics/documents/dojgadocs1_11.pdf last viewed March 20, 2007.
[13] Letter from Joe Rich, et al, to Senators Dianne Feinstein and Bob Bennett. 11 June 2007 (*see attached).*
[14] *Common Cause of Georgia v. Billups*, No. 4:05-CV-0201-HLM (N.D. Ga. Oct. 18, 2005)

The Division's record on every score has undermined effective enforcement of our nation's civil rights laws, but it is the personnel changes to career staff that are, in many ways, most disturbing. For it is the staff that builds trust with communities, develops the cases, and negotiates effective remedies. Career staff has always been the soul of the Division, and it is under attack.

The Blueprint for this attack appeared in an article in National Review in 2002. The article, "Fort Liberalism: Can Justice's civil rights division be Bushified," [15] argued that previous Republican administrations were not successful in stopping the civil rights division from engaging in aggressive civil rights enforcement because of the "entrenched" career staff. The article proposed that "the administration should permanently replace those [section chiefs] it believes it can't trust," and further, that "Republican political appointees should seize control of the hiring process," rather than leave it to career civil servants – a radical change in policy. It seems that those running the Division got the message.

To date, four career section chiefs have been forced out of their jobs, along with two deputy chiefs, including the long serving veteran who was responsible for overseeing enforcement of section 5 of the Voting Rights Act. Since 2005, after the decision's highly politicized decision in the Georgia voter ID case, more than half of the Voting Section's attorneys have left the section.

And, according to a July 2006 article in the *Boston Globe*, "[h]ires with traditional civil rights backgrounds – either civil rights litigators or members of civil rights groups – have plunged. Only 19 of the 45 lawyers [42 percent] hired since 2003 in [the employment, appellate, and voting] sections were experienced in civil rights law and of those, nine gained their

[15] Miller, John J. "Fort Liberalism: Can Justice's civil rights division be Bushified?" National Review. 6 May 2002.

experience either by defending employers against discrimination lawsuits or by fighting against race-conscious policies." By contrast, "in the two years before the change, 77 percent of those who were hired had civil rights backgrounds." And "[m]eanwhile, conservative credentials [of those hired] have risen sharply. Since 2003, the three sections have hired 11 lawyers who said they were members of the conservative Federalist Society. Seven hires in the three sections are listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Cheney campaigns." And, according to McClatchy Newspapers, the political litmus test may have been even broader than the resume analysis shows. Bradley Schlzoman, the Deputy Assistant Attorney General and Acting Assistant Attorney General in the Division, told two 2005 job applicants to delete references to their membership in conservative groups from their resumes and resubmit them. Both were then hired.[16]

In April, a group of anonymous Justice Department employees wrote to the House and Senate Judiciary committees to complain about politicization in the department's hiring process. The deputy attorney general's office, they alleged, was screening department applicants to eliminate Democrats. One Division attorney, a self-described Republican, recounted being asked by then Deputy Assistant Attorney General Brad Schlozman about the political affiliation of one of his friends he had referred for a job. After the employee told Schlozman that he wasn't sure of his friend's "political credentials," the applicant didn't even get an interview.[17]

According to Joe Rich, chief of the Voting Section of the Civil Rights Division from 1999 to 2005, and a 37 year veteran of the Division, political appointees in the Division "demanded that [he] alter performance evaluations for career professionals because of disagreements with the legal or factual conclusions of career attorneys and difference with the

[16] Savage, Charlie. "Justice Department Probes its Hirings." The Boston Globe. 31 May 2007.
[17] Kiel, Paul. "DOJ Lawyer: Controversial Prosecutor Played Politics at Department." TPM Muckraker.com. 24 April 2007.

recommendations they made, not the skill and professionalism with which these attorneys did their jobs."

The *Globe* reporter noted that current and former Division staffers "echoed to varying degrees" that this pattern of political influence of career hires in the Division was what they observed. Recently, the Department announced it was launching an internal investigation into whether the Bush administration officials violated civil service rules by favoring conservative Republicans when hiring lawyers in the Civil Rights Division. This investigation is long overdue.

The amount of expertise in civil rights enforcement that has been driven out of the Division will be difficult to recapture.

Fifty years ago, the attempt to integrate Little Rock High School demonstrated the need for the federal government to finally say "enough." Enough of allowing the states to defy the U.S. Constitution and the courts. Enough of Congress and the Executive Branch sitting idly by while millions of Americans were denied their basic rights of citizenship. The 1957 Act and the creation of the Civil Rights Division were first steps in responding to a growing need.

For years, we in the civil rights community have looked to the Department of Justice as a leader in the fight for civil rights. In the 1960s and 1970s, it was the Civil Rights Division that played a significant role in desegregating schools in the old South. In the 1970s and 1980s, it was the Civil Rights Division that required police and fire departments across the country to open their ranks to racial and ethnic minorities and women. It was the Civil Rights Division that forced counties to give up election systems that locked out minority voters. And it was the civil rights division that prosecuted hate crimes when no local authority had the will.

Members of the Committee, today you begin a process that is long overdue. A process

that will help us to understand the extent of the damage that has been done to the Civil Rights Division, and – hopefully – a roadmap for our way back to vigorous enforcement, integrity, and justice. And a Civil Rights Division the nation can again be proud of.

Thank you.

The Record of the Employment Litigation Section under the Bush Administration

Since its creation fifty years ago, the Employment Litigation Section of the Department of Justice's Civil Rights Division has been at the forefront in protecting our citizens against illegal employment discrimination. For decades and through various administrations, the Employment Section was viewed as an aggressive and effective enforcer of Title VII. Under the current Administration, vigorous enforcement of equal employment opportunity laws has suffered. The Department of Justice has strayed from its historic mission and traditions. As such, careful oversight of its work is particularly critical at this time.

The Employment Litigation Section of the Civil Rights Division is tasked with an important role. The Section is responsible for aggressively enforcing the provisions of Title VII of the Civil Rights Act of 1964 against state and local government employers.[18] Title VII prohibits discrimination in employment based upon race, sex, religion and national origin. The enforcement authority of the Employment Section derives from sections 706 and 707 of Title VII.[19] Section 706 of Title VII authorizes the Attorney General to file a suit against a state or local government employer based upon an *individual* charge of discrimination that has been referred to the Department of Justice by the EEOC. Section 707 authorizes the Attorney General to bring suit against a state or local government employer where there is reason to believe that a "*pattern or practice*" of employment discrimination exists. These are cases that seek broad systemic reform of a selection practice that adversely impacts upon the job opportunities for a protected group.

The importance of the Department of Justice to the effective enforcement of Title VII cannot be overstated. It is the organization with the prestige, expertise, and financial and personnel resources to challenge discriminatory employment practices of state and local government employers. As a general rule, private attorneys and public interest organizations lack the financial and personnel resources to act as private "Attorneys General" in the Title VII enforcement scheme.

Unfortunately, since assuming office, the Bush Administration has cut back radically on its enforcement efforts. It has not filed Title VII lawsuits in substantial numbers and it appears to have abandoned serious Title VII enforcement on behalf of African-Americans. It is vital that the Department of Justice become more vigorous and out-spoken in the effort to address employment discrimination.

DOJ has failed to vigorously enforce the equal employment opportunity laws under this Administration.

A review of enforcement activity since 2001 reveals that the Employment Section has

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[18] 42 U.S.C. § 2000e *et seq.*
[19] 42 U.S.C. §§ 2000e-5 & 6.

failed to fulfill its mission under this Administration.[20] The number of Title VII lawsuits filed by the Section is down considerably from prior Administrations – both Republican and Democrat.

Since January 20, 2001, the Bush Administration filed just 35 Title VII cases, or an average of approximately **six** cases per year. This number includes five cases in which the DOJ intervened in ongoing litigation and two cases initiated by the U.S. Attorney's Office for the Southern District of New York (using its own resources). By comparison, the Clinton Administration filed 34 cases in its first two years in office. By the end of its term in office, the Clinton Administration had filed 92 complaints of employment discrimination or more than **eleven** cases per year. Standing alone, the lack of Title VII enforcement by the Employment Section is grave cause for concern.

Furthermore, the mix of cases filed also has changed. The Section has filed few cases on behalf of African Americans. In fact, the Section has directed a portion of its precious resources to "reverse discrimination" cases on behalf of white individuals. In other cases, the Section abandoned well-established government positions. In two recent Supreme Court cases, the Solicitor General refused to defend the longstanding legal positions of the Equal Employment Opportunity Commission, opting instead for a more restrictive reading of Title VII. In these cases, the Employment Section either failed to advocate for the EEOC's position or was ineffective in attempting to direct policy toward aggressive enforcement. Compounding these problems are major changes in personnel that have resulted in the loss of dedicated career staff, low morale, and a decrease in productivity. Each of the concerns is addressed in more detail below.

DOJ has failed to enforce Title VII vigorously to address discrimination against individuals.

DOJ has the authority to bring suit on behalf of individual plaintiffs under section 706 of Title VII. Individuals who believe they are the victims of employment discrimination may file a charge of discrimination with the Equal Employment Opportunity Commission. If the charge of discrimination is against a state or local government employer, the EEOC may refer the charge to the DOJ following a determination that the charge has merit and efforts to resolve the matter voluntarily have failed.

DOJ receives more than 500 of these referrals from the EEOC each year. Even though cases brought pursuant to section 706 referrals do not affect large numbers of employees or may not establish new law, they are nevertheless important enforcement vehicles. Among others, these cases often address unique issues of intentional or purposeful discrimination or address issues that members of the private bar might not be qualified or able to handle. In smaller communities, members of the private bar might not be willing to represent an individual in a suit against the local government for fear of retaliation.

Since the year 2000, the EEOC referred over **3,000** individual charges of discrimination to the Employment Section, but the Section has filed just **25** individual cases since 2001. Thus,

[20] Information about the Employment Litigation Section's complaints, court approved consent decrees and judgments, and out-of-court settlements can be found at http://www.usdoj.gov/crt/emp/papers.html.

the Employment Section filed suit in **less than one percent** of the individual cases referred by the EEOC. By contrast, the Employment Section filed **73** individual cases during the previous Administration. At this rate, the Bush Administration will have filed **less than half** the number of individual Title VII cases that were filed during the previous Administration.

DOJ also has failed to vigorously enforce Title VII to address systemic discrimination in pattern or practice cases.

Pattern or practice Title VII cases are the most important and significant cases because they have greatest impact. Not only do pattern or practice cases affect a large number of employees, they often break new legal ground. These pattern or practice cases can eliminate employment and selection practices that have the purpose or effect of discriminating on the basis of race, sex, religion, and national origin. Pattern or practice suits are critically important vehicles for meaningful and far reaching reform of employment practices that unjustifiably limit employment opportunities for minorities and women -- and the DOJ is uniquely equipped to bring them. Pattern or practice suits are expensive and require substantial expertise. Few private parties or organizations have the expertise or resources to bring these suits. Thus, there is nobody to fill the void if the DOJ fails to bring such suits. Unfortunately, the number of pattern or practice cases filed during this Administration reveals that DOJ is not actively enforcing equal employment opportunity laws.

The number of pattern or practice cases is a strong indicator to the employer community as to whether the DOJ is actively enforcing Title VII. Unlike section 706 Title VII cases, section 707 pattern or practice cases are not dependent upon the referral of a charge of employment discrimination from the EEOC. Under section 707, the Attorney General has "self-starting" authority to initiate pattern or practice discrimination investigations and cases against public employers. Over the past **six years**, the Employment Section has filed just **10** pattern or practice cases. By comparison, in just the first **two years** of the Clinton Administration, the Employment Section filed **13** pattern or practice cases. A closer look behind these statistics reveals further evidence of DOJ's disturbing departure from vigorous enforcement of Title VII.

DOJ has filed few cases on behalf of African-Americans.

Traditionally, combating racial discrimination has been a core mission of the Employment Section. The Civil Rights Division was formed to eradicate race discrimination against African-Americans and, for most of its first fifteen years; it devoted all its resources to this goal. Over the years, the mission of the Division expanded as new civil rights laws were passed and new areas of civil rights enforcement were pursued by a variety of groups and organizations. But historically, combating discrimination against African-Americans has remained a central priority of the Division through both Republican and Democratic administrations. However, it is clear from the record of this Administration that race discrimination against African-Americans is a very low enforcement priority.

Of the 25 individual employment discrimination cases filed by this Administration, only **six** cases involved allegations of race discrimination. Under the Clinton Administration, the Employment Section filed **twelve** individual race discrimination cases.

The Bush Administration has also filed few pattern or practice cases on behalf of African Americans. Over the past six years, the Employment Section has filed just **six** pattern or practice cases alleging race discrimination. By comparison, the previous Administration filed **eight** pattern or practice cases alleging race discrimination **in its first two years**. Two of the systemic race discrimination cases filed during this Administration actually alleges discrimination against whites.[21] Another case alleges discrimination against Native Americans[22] and another case was initially filed by the U.S. Attorney's Office for the Southern District of New York.[23] Thus, the ELS can lay claim to filing **two** pattern or practice cases in six years that allege race discrimination against African-Americans.[24] Furthermore, these two cases were not filed until 2006, more than five years into the Bush Administration.[25]

These statistics demonstrate that the current Administration has devoted fewer resources to addressing employment discrimination against African Americans. At the same time, the Administration has devoted increased resources to "reverse discrimination" cases.

DOJ has devoted significant resources to "reverse discrimination" cases alleging discrimination against whites.

Instead of devoting its resources to address discrimination against racial minorities, the Administration has directed significant resources to bring a number of "reverse discrimination" cases on behalf of white individuals.

In July 2005, the Employment Section filed a reverse discrimination suit on behalf of white males.[26] Ignoring decades of institutional discrimination against minorities by the City of Pontiac, the Employment Section alleged that a 1984 Collective Bargaining Agreement "creat[ed] and maintain[ed] a dual system for hire and promotion ...which constitute[d] a pattern or practice of [discriminating against non-minorities and men]" in violation of Title VII.

In February 2006, the Employment Section filed another reverse discrimination case. In this case, the Employment Section attacked minority and women graduate fellowship programs at Southern Illinois University.[27] DOJ alleged that the fellowship program discriminated against whites and men. The fellowships at issue were aimed at increasing the minority enrollment in graduate programs at Southern Illinois University, where Blacks and Hispanics constituted less than 8% of the University's 5,500 graduate students. These fellowships had assisted 129 students with a combined annual budget of $200,000 which was a drop in the bucket compared to the approximate $12 million dollars in fellowship assistance flowing to the predominantly white graduate fellows. As a result of the suit, the university abandoned its fellowship program

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[21] *United States v. Board of Trustees of Southern Illinois University,* CA 06-4037 (S.D. Ill. filed Feb. 8, 2006); *United States v. Pontiac, Michigan Fire Department,* No. 2:05-CV-72913 (E.D. Mich. filed Jul. 27, 2005).
[22] *United States v. City of Gallup, NM,* CIV 04-1108 (D.N.M. filed Sept. 29, 2004).
[23] *United States v. City of New York and New York City Housing Authority,* 1:02-cv-044699-DC-MHD (S.D.N.Y. filed June 19, 2002)
[24] *United States v. Virginia Beach Police Dept.,* (E.D. Va. filed Feb. 7, 2006); *United States v. Chesapeake City,* (E.D. Va. filed July 24, 2006).
[25] *United States v. Virginia Beach Police Department,* 06cv189 (E.D. Va. filed Feb. 7, 2006).
[26] *United States v. City of Pontiac, Michigan,* No. 2:05-CV-72913 (E.D. Mich. filed July 26, 2005).
[27] *United States v. Southern Illinois University,* CA 06-4037 (S.D. Ill. filed Feb. 8, 2006).

for minorities and women.

While all citizens are entitled to the protections of our civil rights laws, African Americans have historically been and remain the primary victims of race discrimination on the job. For that reason, the Department has always placed high priority on fighting race-based discrimination against African Americans. In redirecting precious resources to these "reverse discrimination" cases, this Administration has signaled a shift away from fulfilling its core mission.

In recent Supreme Court cases, DOJ has endorsed restrictive interpretations of Title VII.

In two recent Supreme Court cases, the Bush Administration endorsed restrictive interpretations of Title VII's anti-discrimination and anti-retaliation protections. In both of these cases, the Solicitor General expressly rejected EEOC's well-established position. In these cases, the Employment Litigation Section either agreed with the Solicitor General's restrictive interpretations, or the Employment Section was ineffective in urging the Solicitor General to aggressively enforce the protections of Title VII. Regardless, the Administration should be vigorously enforcing Title VII, rather than seeking to limit the scope of its protections.

In an amicus curiae brief filed in *Burlington Northern and Santa Fe Railway Co. v. White*,[28] the Solicitor General advocated unsuccessfully for a narrow interpretation of Title VII's anti-retaliation provision.[29] The Solicitor General refused to advocate the EEOC's well-established guidance that established broad protection for employees. Instead, the Solicitor General joined with the employer, arguing that the anti-retaliation provision only prohibits retaliation that affects the terms and conditions of employment, but not retaliation that takes place outside of the workplace. Ultimately, in a unanimous decision (with Justice Alito concurring in the judgment), the Supreme Court expressly rejected DOJ's watered-down position and endorsed the longstanding EEOC standard. Even conservative Justice Scalia stated that the EEOC standard deserved deference. The Court held that the Solicitor General's narrow interpretation was inconsistent with the language of Title VII and inconsistent with the primary objective of the anti-retaliation provision: to provide broad protection to employees who seek to enforce the protections of Title VII.

More recently, in the pending Supreme Court case of *Ledbetter v. Goodyear*,[30] the Solicitor General again failed to advocate for longstanding EEOC regulations, and the civil rights community again was forced to make those arguments in its place. *Ledbetter* presents a statute of limitations question in the pay discrimination context. Specifically, the question is whether a Title VII plaintiff may recover when disparate pay is received during the statutory limitations period, but is the result of intentional discriminatory decisions made outside the limitations period. The Solicitor General again sided with the employer, arguing that the employee cannot recover if the disparate pay is the result of a decision outside of the 180 day limitations period. In support of the Title VII plaintiff employee, the civil rights community advocated for deference to the EEOC's well-established position that every paycheck that compensates an employee less

[28] 126 S. Ct. 2405 (2006).
[29] 42 U.S.C. § 2000e-3(a).
[30] 421 F.3d 1169 (11th Cir. 2005), cert. granted, 126 S. Ct. 2965 (2006).

than a similarly-situated employee because of sex constitutes a new violation of Title VII. The Supreme Court has yet to issue its opinion in *Ledbetter*.

DOJ has abandoned established positions in ongoing cases.

DOJ also has abandoned long-standing positions in ongoing litigation and settled on appeal for a fraction of the amount awarded in an administrative hearing.

In one such case, the Employment Section unsuccessfully sought to dismiss a case in the middle of litigation, which would have permitted the employer to use a discriminatory and invalid selection test. The Employment Section first sued the City of Buffalo's police department in 1974, alleging that it had engaged in a pattern and practice of employment discrimination against African Americans, Hispanics, and women, in violation of Title VII and the Fourteenth Amendment.[31] After prevailing on the merits, a Final Decree and Order was entered in 1979, which ordered, among other things, interim hiring goals for minorities in the police department. In over two decades, the City never fully complied with the terms of this court-ordered settlement. Yet in 2002, the Employment Section dramatically reversed its position by offering to dismiss the case, arguing that the relief being provided minorities under the agreement constituted unconstitutional race-conscious relief, despite the fact that the selection procedure in place at the time had not been validated as required by Title VII. The Employment Section proposed that the City be permitted to use a discriminatory and invalid selection examination despite the fact that the City had failed for 24 years to comply with a court order to create a fair and non-discriminatory test. DOJ's arguments were expressly rejected by the court.

In a sex discrimination case against a textile manufacturer, the Employment Section settled on appeal for a fraction of the amount that had been awarded to victims of discrimination in the decision below.[32] The case originated when the Department of Labor's Office of Federal Contract Compliance Programs began an investigation of Greenwood Mills, a federal contractor, pursuant to its authority under Executive Order 11246. The investigation revealed that Greenwood Mills had hired just one woman and thirty men for entry-level jobs in its textile plant, despite the fact that significant numbers of women had applied. In 2002, the Administrative Review Board of the Department of Labor issued a decision granting nearly $400,000 in back pay and interest to be divided among the female applicants who had been rejected for these entry level jobs. When Greenwood Mills appealed this decision, the Employment Section settled the case for $56,000, rather than defend the judgment issued by the Department of Labor.

These cases provide further examples of the ways in which DOJ has abandoned its role as a vigorous enforcer of Title VII.

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[31] *United States v. Buffalo Police Department*, No. 73 CV-414 (W.D.N.Y.).
[32] *Greenwood Mills v. Chao*, C.A. No. 8:95-40004-20 (D.S.C.).

DOJ has reassigned dedicated career lawyers, morale has plummeted, productivity has lowered, and civil rights enforcement has suffered.

During the Bush Administration, the Employment Section has lost significant numbers of dedicated career lawyers. Under the new leadership, morale among career attorneys has plummeted, productivity has lowered, and civil rights enforcement has slowed. The political nature of this deterioration has been the subject of numerous articles.[33] There has always been normal turnover in career staff in the Civil Rights Division, but it has never reached such extreme levels and never has it been so closely related to the manner in which political appointees have administered the Division. It has stripped the division of career staff at a level not experienced before.

In the past, it was rare for political appointees to remove and replace career section chiefs for reasons not related to their job performance, and political appointees never removed deputy section chiefs. However, shortly after the new Administration took office, longtime career supervisors who were considered to have views that differed from those of the political appointees were reassigned or stripped of major responsibilities. The Employment Section chief and one of four deputy chiefs were involuntarily transferred in April 2002. Shortly after that, a special counsel was involuntarily transferred. Since then, two other deputy chiefs left the section or retired. Overall, since 2002, the section chief and three of the four deputy chiefs have been involuntarily reassigned or left the section.

This type of administration has had an extremely negative impact on the morale of career staff. The best indicator of this impact is in the unprecedented turnover of career personnel. Twenty-one of the 32 attorneys in the Section -- **over 65%** -- have either left the Division or transferred to other sections. Additionally, loss of professional paralegals and civil rights analysts had been significant. Twelve professionals have left the Employment Section, many with over 20 years of experience. These employees were instrumental in building and maintaining an aggressive Title VII enforcement unit.

The Employment Section became top heavy with management, which is likely to be part of the reason its productivity is way down. The Employment Section has a staff of approximately 60, of which seven are managers, 25 are line attorneys, twelve are paralegals, one is a trained statistician, and the remaining staff provides administrative support. Until 2001, the Section's management team consisted of a section chief and three and occasionally four deputy section chiefs. Today, there is one section chief and six deputy section chiefs. This means that there is approximately one supervisor for every three high-level line attorneys. The inexplicable increase in the Employment Section management team means that there are fewer attorneys available to tend to the Section's Title VII enforcement responsibilities.

Compounding the impact of the extraordinary loss of career staff in recent years has been a major change in the Division's hiring practices. The new hiring procedures virtually eliminated career staff input from the hiring of career attorneys. This has led to the perception and reality of new staff attorneys having little if any experience in or commitment to the enforcement of civil rights laws and, more seriously, injecting political factors into the hiring of

[33] *See* http://www.washingtonpost.com, 11/17/05., "Legal Affairs," September/October 2005.

career attorneys. The overall damage caused by losing a large body of the committed career staff and replacing it with persons with little or no interest or experience in civil rights enforcement has been severe and will be difficult to overcome.

Since 1954, the primary source of attorneys in all divisions in the Department has been the attorney general's honors program. This program was instituted by then Attorney General Herbert Brownell in order to end perceived personnel practices "marked by allegations of cronyism, favoritism and graft." Since its adoption, the honors program has been consistently successful in drawing the top law school graduates to the Department.

Until 2002, career attorneys in the Civil Rights Division played a central role in the process followed in hiring attorneys through the honors program. Each year career line attorneys from each section were appointed to an honors hiring committee which was responsible for traveling to law schools to interview law students who had applied for the program. Because of the tremendous number of applications for the honors program, committee members generally would limit their interviews to applicants who had listed the Civil Rights Division as their first choice when applying. The Civil Rights Division had earned a reputation as the most difficult of the Department's divisions to enter through the honors program because only a few positions were open each year and so many highly qualified law students desired to work in civil rights.

After interviewing was completed, the hiring committee would meet and recommend to the political appointees those whom they considered the most qualified. Law school performance was undoubtedly a central factor, but a demonstrated interest and/or experience in civil rights enforcement and a commitment to the work of the Division were also key qualities that interviewers sought in candidates selected to join the career staff of the Division. Political appointees rarely rejected these recommendations.

Hiring of experienced attorneys followed a similar process. Individual sections with attorney vacancies would review applications and select those to be interviewed. They would conduct initial interviews and the section chief would then recommend hires to Division leadership. Like recommendations for honors hires, these recommendations were almost always accepted by political appointees.

These procedures have been very successful over the years in maintaining an attorney staff that was of the highest quality – in Republican as well as Democratic administrations. A former Deputy Assistant Attorney General in the Reagan Administration, who was interviewed for a recent *Boston Globe* article about Division hiring practices, said that the system of hiring through committees of career professionals worked well. The article quoted him as saying: "There was obviously oversight from the front office, but I don't remember a time when an individual went through that process and was not accepted. I just don't think there was any quarrel with the quality of individuals who were being hired. And we certainly weren't placing any kind of litmus test on . . . the individuals who were ultimately determined to be best qualified."[34]

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[34] Charlie Savage, *Civil Rights Hiring Shifted in Bush Era; Conservative Leanings Stressed*, BOSTON GLOBE, July 23, 2006, at A1.

But, in 2002, these longstanding hiring procedures were abandoned, not only in the Civil Rights Division but throughout the Department. The honors hiring committee in the Division was disbanded and all interviewing and hiring decisions were made directly by political appointees with no input from career staff or management. As for non-honors hires, the political appointees similarly took a much more active roll in selecting those persons who received interviews, and almost always participated in the interviewing process.

Not surprisingly, these new hiring procedures have resulted in the resurfacing of the perception of favoritism, cronyism, and political influence that the honors program had been designed to eliminate in 1954. Indeed, information that has come to light recently indicates that in many instances, this is more than perception. In July 2006, a reporter for the *Boston Globe* obtained pursuant to the Freedom of Information Act the resumes and other hiring data of successful applicants to the voting, employment, and appellate sections from 2001-2006. His analysis of this data indicated that:

- "Hires with traditional civil rights backgrounds – either civil rights litigators or members of civil rights groups – have plunged. Only 19 of the 45 [42 percent] lawyers hired since 2003 in those [the employment, appellate, and voting] sections were experienced in civil rights law, and of those, nine gained their experience either by defending employers against discrimination lawsuits or by fighting against race-conscious policies." By contrast, "in the two years before the change, 77 percent of those who were hired had civil rights backgrounds."

- "Meanwhile, conservative credentials [of those hired] have risen sharply. Since 2003, the three sections have hired 11 lawyers who said they were members of the conservative Federalist Society. Seven hires in the three sections are listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Cheney campaigns."

The reporter noted that current and former Division staffers "echoed to varying degrees" that this pattern was what they observed. For example, a former deputy chief in the Division who now teaches at the American University Law School testified at an American Constitution Society panel on December 14, 2005 that several of his students who had no interest in civil rights and who had applied to the Department with hopes of doing other kinds of work were often referred to the Civil Rights Division. He said every one of these persons was a member of the Federalist Society.

In addition to these personnel changes, the decision making process has changed. Political appointees in the Division have closed themselves off from career staff. Regular meetings of all of the career section chiefs together with the political leadership were discontinued from the outset of this Administration. Such meetings had always been an important means of communication in an increasingly large Division that was physically separated in several different buildings. This lack of cooperation between political appointees and career staff has caused vigorous enforcement of the law to suffer. One former Civil Rights Division attorney described the importance of including career attorneys in the decision making process:

> [S]eparation of powers was designed to enable both civil service attorneys and political appointees to influence policy. This design, as well as wise policy, requires cooperation between the two groups to achieve the proper balance between carrying out administration policy and carrying out core law enforcement duties. Where one group shuts itself out from influence by the other, the department's effectiveness suffers.[35]

During the Bush Administration, there has been a conscious effort to attack and change career staff. This has resulted in a major loss of career personnel with many years of experience in civil rights enforcement and in the valuable institutional memory that had always been maintained in the Division until now – in both Republican and Democratic administrations. Replacement of this staff through a new hiring process has resulted in the perception and reality of politicization of the Division. The overall impact has been a loss of public confidence in fair and even-handed enforcement of civil rights laws by the Department of Justice.

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[35] Brian K. Landsberg, "Role of Civil Servants and Appointees," *Enforcing Civil Rights: Race Discrimination and the Department of Justice* (University Press of Kansas 1997) at 156. Landsberg was a career attorney in the Civil Rights Division from 1964-86 during which he was chief of the Education Section for five years and then chief of the Appellate Section for twelve years. He now is professor of law at McGeorge Law School.

The Employment Litigation Section by the Numbers

Total Title VII cases:

- The Employment Section has filed **35** Title VII cases filed over 6 years, or **6** cases per year on average.
- This is about half the rate of the previous Administration, which filed a total of **92** Title VII cases, an average of more than **11** cases per year.

Individual Title VII cases:

- Over the past six years, the EEOC has referred over **3,000** individual charges of discrimination to the Employment Litigation Section.
- The Section has filed just **25** individual cases since 2001, or an average of about **4** cases per year.
- This is about half the rate of the previous Administration, which filed a total of **73** individual cases, an average of about **9** cases per year.

Pattern or practice Title VII cases:

- Over the past six years, the Employment Section has filed just **10** pattern or practice cases.
- By comparison, the previous Administration filed **13** pattern or practice cases in the first two years alone.

Race discrimination cases:

- Only **6** of the **25** individual Title VII cases involve allegations of race discrimination; by contrast, the previous Administration filed **12** individual race discrimination cases.
- The Employment Section has filed **6** pattern or practice race discrimination cases since 2001; by contrast, the previous Administration filed **8** pattern or practice race discrimination cases **in its first two years**.
- The Employment Section can lay claim to filing just **2** pattern or practice cases that allege race discrimination against African Americans.
- The Employment Section has filed **2** "reverse discrimination" pattern or practice cases alleging discrimination against white males.

Sex discrimination cases:

- The Employment Section has filed just **1** pattern or practice sex discrimination case on behalf of women.

Staff reassignment and attrition:

- Under this Administration, the section chief and **3** of the 4 deputy chiefs have been involuntarily reassigned or left the section.
- **21** of the 32 attorneys in the Section have left the Civil Rights Division or transferred to other sections.

The Record of the Housing and Civil Enforcement Section under the Bush Administration[36]

The Housing and Civil Enforcement Section enforces: the Fair Housing Act, which prohibits discrimination in housing; the Equal Credit Opportunity Act, which prohibits discrimination in credit; Title II of the Civil Rights Act of 1964, which prohibits discrimination in certain places of public accommodation, such as hotels, restaurants, nightclubs and theaters; the Religious Land Use and Institutionalized Persons Act, which prohibits local governments from adopting or enforcing land use regulations that discriminate against religious assemblies and institutions or which unjustifiably burden religious exercise; and the Service-members Civil Relief Act, which provides for the temporary suspension of judicial and administrative proceedings and civil protections in areas such as housing, credit and taxes for military personnel while they are on active duty. [37]

The Department has the capacity as a federal government agency to subpoena where private groups do not and to launch large investigations. The public depends on the department to step in where individuals and private organization do not have the ability to do so.

Although the Housing and Civil Enforcement Section covers an array of laws, its primary focus is housing. Out of the 297 cases on the Section's website (i.e. cases resolved between 1993 and 2007), 275 were housing-related cases.

How the Housing and Civil Enforcement Section Gets Cases

According to the DOJ's website:

> Under the Fair Housing Act, the Department of Justice may start a lawsuit where it has reason to believe that a person or entity is engaged in a "pattern or practice" of discrimination or where a denial of rights to a group of persons raises an issue of general public importance. Through these lawsuits, the Department can obtain money damages, both actual and punitive damages, for those individuals harmed by a defendant's discriminatory actions as well as preventing any further discriminatory conduct. The defendant may also be required to pay money penalties to the United States.
>
> The Department of Housing and Urban Development (HUD) investigates individual cases of discrimination in housing. If HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred, then either the complainant or the respondent may elect to have the case heard in federal court. In those instances, the Department of Justice will bring the case on behalf of the individual complainant.
>
> In addition, where force or a threat of force is used to deny or interfere with fair housing rights, the Department of Justice may begin criminal proceedings. Finally, in cases

[36] The LCCR Housing Task force is chaired by the National Fair Housing Alliance and the NAACP Legal Defense and Educational Fund

[37] http://www.usdoj.gov/crt/housing/housing_main.htm

involving discrimination in home mortgage loans or home improvement loans, the Department may file suit under both the Fair Housing Act and the Equal Credit Opportunity Act.[38]

Issues of Concern

Decreasing Number of Cases and Changes in Priorities

In the past four years, the number of cases the Section has filed overall has precipitously decreased (by 29%).

TOTAL CASES FILED

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
48	45	53	49	29	38	42	31

One major drop off in case handling has been with race cases. In the past four years, the number of race cases the Section has filed has fallen drastically (by 43%).

RACE CASES FILED

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
16	21	20	19	7	8	10	8

By contrast, disability cases have retained their numbers, even though the overall number of cases filed by DOJ has decreased by 29%, as mentioned above. (The number of cases filed in the first four years [FY99 – FY02] is 73 cases, compared to the second four years [FY03 – FY06], which is 74 cases.)

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
16	12	24	21	16	23	21	14

Low Number of Testing Cases

In 1992, the Section began its own testing program. As of 2005, 1,000 employees from various Department components nationwide have been trained as testers.

There has been a precipitous decline in the number of testing cases filed in the past 4 years especially. Only 31 cases involving testing have been filed in the past eight years (FY99 – FY06). Of particular note, only 7 of those cases were brought in the last four years.

[38] http://www.usdoj.gov/crt/housing/faq.htm#enforce

TESTING CASES FILED

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
10	5	5	4	2	1	1	3

Low Number of Lending Cases

Only five fair lending cases have been filed in the past four years. This is in spite of the fact that numerous studies have shown the link between predatory and subprime lending and race. Here are three such studies, just to name a few:

Bosian, Debbie; Ersnst, Keith; Li, Wei. "Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages," Center for Responsible Lending. May 31, 2006.

Wyly, Atia, Foxcroft, Hammel, Phillips-Watts, "American Home: Predatory Mortgage Capital and Neighborhood Spaces of Race and Class Exploitation in the United States", Geografiska Annales 88B, 2006.

Turner, Margaret Austin, et al., All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions, The Urban Institute, April 2002.

With the ballooning sub-prime market over the years, one would have expected to see an increase in these cases by DOJ.

Loss of Qualified Staff

As with many other sections of the Department, qualified staff have left and/or been pushed out by this administration. Many of these staff people would be available to speak to committee staff and many may be able to testify.

With the loss of qualified staff there is a loss of institutional memory, a loss of individuals familiar with the Fair Housing Act and other laws covered by the section.

Refusal to Take Disparate Impact Cases

In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination (HUD HUB Directors' meeting Rhode Island 2003). DOJ's decision was a sharp break from DOJ's decades-long, bipartisan policy to aggressively litigate these cases.

Disparate impact cases are crucial in the fight against housing discrimination. Many rental, sales, insurance, and related policies are not discriminatory on their face, but have a disparate impact on members of protected classes. Among those that are more subtly discriminatory, some have a discriminatory *intent* and others have a discriminatory *impact*. Even though there may not be any intent in the policy, it can have just as detrimental an effect on individuals and families trying to find housing. Examples of disparate impact include (1) a limit

on the number of persons per bedroom to one has a disparate impact against families with children and (2) a minimum loan or insurance amount has a disparate impact against properties in minority neighborhoods. The federal government is often the only entity with the capacity to investigate and litigate such fair housing complaints.

Refusal to Take HUD Election Cases

In addition, as mentioned on DOJ's own website (as cited above), DOJ is to bring cases referred by HUD on behalf of a complainant. Unfortunately, DOJ has failed to file "election" cases (cases in which a party to a HUD complaint that has been charged has elected to have the case heard in federal court, rather than before a HUD Administrative Law Judge) in a timely manner. They have also dragged out cases much longer than required, requiring more and more investigations.

The Fair Housing Act as Amended (1988) clearly states that DOJ must pursue cases charged by HUD. DOJ has recently taken the stance that it is not required to file these cases but that it may instead perform additional investigations, thereby prolonging and duplicating the process. DOJ has even stated that this provision of the fair housing law is unconstitutional.

There is a case out of Chicago in which DOJ refused to file a federal suit after HUD referred the case. The back and forth went on with DOJ so long, eventually involving Representative Jesse Jackson, Jr.'s request to DOJ to investigate the case. The case eventually settled – but the DOJ's actions served to undercut the relief provided to the complainants in the case.

Poor Case Work

Another case out of Chicago demonstrates DOJ's poor case work. Initially, DOJ would not take the case; the Illinois attorney general had to file a motion to get DOJ to do something. Once DOJ got involved, a settlement was reached between DOJ and the respondent. The housing provider was prepared to include $100,000 in the settlement that would fund programs at the local school for the children against whom the provider had discriminated. The DOJ refused to accept the $100,000 on behalf of the children saying that education had nothing to do with housing. (Fortunately, the complainant was able to settle independently with the housing provider for the additional funding on behalf of the children.

The Record of the Voting Section under the Bush Administration[39]

Enforcement of Section 5 of the Voting Rights Act.

Section 5 of the Voting Rights Act, which was part of the original Act and was reauthorized most recently last year for 25 years, requires jurisdictions with a history of discrimination to demonstrate to the Justice Department or the District Court of the District of Columbia that any voting changes they make do not have a discriminatory purpose or effect. Section 5 is arguably the most influential provision of the Act.

Problems relating to this administration's enforcement of Section 5 are illustrative of the issues in the Voting Section. Many of the Section 5 Unit's most experienced staff members -- the Deputy Chief in charge of Section 5, attorney reviewers, and civil rights analysts – have left the Section in the last 2-3 years. In several instances, particular lawyers were assigned to work on immigration matters and these lawyers left the Section not long after. The turnover in personnel is especially disconcerting as we get closer to the 2010 Census, when the Voting Section's workload expands dramatically as thousands of jurisdictions that are subject to Section 5 engage in their decennial redistricting.

Several decisions have been made where it appears that political considerations may have trumped the Civil Rights Division's obligation to enforce the Voting Rights Act. These decisions also suggest that the Division is no longer following its own Guidance regarding the manner for making Section 5 preclearance determinations. In 2002, the administration intentionally delayed making a determination on a Mississippi Congressional plan drawn by a state appellate court so that a plan that favored Republicans drawn by federal judges would be used instead. In 2003, the political appointees disregarded a recommendation that a Texas Congressional redistricting plan be objected to because it resulted in the retrogression of minority voting strength. That plan was later struck down, on other grounds, by the Supreme Court. In 2005, the administration precleared Georgia's government-issued photo identification law despite numerous comment letters outlining the impact that the law would have on minority voters and over the recommendation of an objection from the majority of the staff who worked on it. The law was later found unconstitutional by both state and federal courts.

Election observing and monitoring

Given Assistant Attorney General Wan Kim's recent acknowledgement of the intimidating effect that prosecutors can have on voters, there is a need to clearly define the contours of the relationship between the Department of Justice and U.S. Attorney's Offices in the execution of the Division's attorney monitoring of elections. In many recent elections, the Division has relied on personnel from U.S. Attorney's Offices to carry out its attorney monitoring program in jurisdictions throughout the country. The use of federal prosecutors inside polling places has blurred the line of separation that has long been maintained between the civil rights and criminal enforcement units of the Department of Justice. Moreover, federal

[39] The LCCR Voting Rights Task Force is co-chaired by the Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund.

prosecutors inside polling places can have an intimidating effect on minority voters.

Although the Department of Justice has both civil rights and criminal enforcement responsibilities with respect to voting, traditionally, the Civil Rights Division has focused on non-criminal aspects of the electoral process. Though the Civil Rights Division and Criminal Division communicate and coordinate, prior to the current administration there was a clear separation. The Civil Rights Division was engaged in extensive pre-election and Election Day observing and monitoring activities. The Criminal Division, on the other hand, is to steer clear of Election Day activity and prosecute, where appropriate, after elections.

Under this administration, the lines have been blurred. In 2002, Attorney General Ashcroft created a Voting Integrity Program that combined the civil rights and criminal efforts for Election Day observing and monitoring. Since then, in many jurisdictions, career prosecutors in the United States Attorneys' Office have played critical roles in the observing and monitoring of elections. This has resulted in the erosion of trust of the Justice Department in many minority communities who are more comfortable working with civil rights lawyers on election issues.

Departure from traditional mission of the Voting Section/Allocation of resources

A major issue throughout the Civil Rights Division in the current administration has been how resources have been allocated. There has been a noticeable decrease in emphasis on bringing cases on behalf of racial minorities. The record of the Voting Section is consistent in departing from the Voting Section's traditional mission.

The Voting Section did not file any cases on behalf of African American voters during a five-year period between 2001 and 2006 and no cases have been brought on behalf of Native American voters for the entire administration. In addition, during the same five-year period, the Department only filed one case alleging minority vote dilution in violation of Section 2 of the Act. Section 2 vote dilution cases are particularly important because the end result – an election system that enables minority voters to have an equal opportunity to elect its candidates of choice – has a significant positive impact on minority voters. The administration rejected several recommendations from the Voting Section to bring particular cases. Conversely, in 2004, the Section brought a case on behalf of white voters in Mississippi.

Furthermore, the Department has gone out of its way to take legal positions that have restricted the franchise, such as filing an *amicus curiae* brief in a 2004 Michigan case involving provisional ballots where the government argued that the Help America Vote Act permitted states to reject provisional ballots solely on the basis that the voter did not cast the ballot in the proper precinct.

Loss of confidence in the Voting Section in the civil rights community

Recently, the Civil Rights Division has come under intense scrutiny from civil rights organizations and community leaders regarding cases that have been filed that appear to extend beyond the Division's historical mandate. Perhaps the most scrutinized of these cases was the Voting Section's recent litigation on behalf of white voters in Noxubee, Mississippi. This case

recently went to trial and a decision is pending. However, the Division must deal with and respond to growing distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities. Restoring these ties to the community is essential to the Division's ability to effectively carry out its work. Community contacts have played and continue to play an important role in the Division's ability to effectively investigate and enforce federal civil rights statutes. This is especially important to the work of the Voting Section where Section 5 preclearance determinations are based, in part, on Comments typically provided by local community contacts.

June 11, 2007

The Honorable Diane Feinstein
The Honorable Bob Bennett
Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
Washington, DC 20510

Dear Chairperson Feinstein and Ranking Member Bennett:

As former career professionals in the Voting Section of the Department of Justice's Civil Rights Division, we urge you to reject the nomination of Hans A.von Spakovsky to the Federal Election Commission (FEC). Prior to his current role as a recess appointee to the FEC, Mr. von Spakovsky oversaw the Voting Section as Voting Counsel to the Assistant Attorney General of the Civil Rights Division from early in 2003 until December, 2005. While he was at the Civil Rights Division, Mr. von Spakovsky played a major role in the implementation of practices which injected partisan political factors into decision-making on enforcement matters and into the hiring process, and included repeated efforts to intimidate career staff. Moreover, he was the point person for undermining the Civil Rights Division's mandate to protect voting rights. Foremost amongst his actions was his central decision-making role on a matter where he clearly should have recused himself. We urge you to use this confirmation process as an opportunity to thoroughly examine Mr. von Spakovsky's tenure at the Department of Justice and how his commitment to party over country will affect his decision making at the FEC.

Each of us came to the Voting Section to participate in the crucial role the Department of Justice plays in protecting all Americans without fear or favor. We saw this as an honor. Our commitment to public service was grounded in the belief that every American should have an equal opportunity to participate in our political process. We sought to work for the Civil Rights Division because of our patriotism, because of the honor of service and because of our commitment to the historic and heroic work of our predecessors in the Division. We are deeply disturbed that the tradition of fair and vigorous enforcement of this nation's civil rights laws and the reputation for expertise and professionalism at the Division and the Department has been tarnished by partisanship. Over the past five years, the priorities of the Voting Section have shifted from its historic mission to enforce the nation's civil rights laws without regard to politics, to pursuing an agenda which placed the highest priority on the partisan political goals of the political appointees who supervised the Section. We write to urge you not to reward one of the architects of that unprecedented and destructive change with another critical position enforcing our country's election laws.

During his three years in the front office of the Civil Rights Division, Mr. von Spakovsky assumed primary responsibility for the day to day operation of the Voting Section. His superiors gave him the authority to usurp many of the responsibilities of the career section chief and institute unprecedented policies that have led to a decimation of the Section and its historic and intellectual resources.

Personnel management decisions in place at the Justice Department were abandoned during Mr. von Spakovsky's tenure. Rules designed to shield the civil service from the political winds of changing administrations were cast aside in favor of a policy designed to permit partisanship to be inserted into career hiring decisions. In the past, career managers took primary responsibility for the hiring decisions of the civil service. During Mr. von Spakovsky's tenure that changed. Career managers were shut out of the process and criteria for hiring career staff shifted from rewarding legal capacity, experience and especially commitment to civil rights enforcement, to prioritizing a candidate's demonstrated fidelity to the partisan interests of the front office. Mr. von Spakovsky vigorously carried out this policy in hiring interviews he conducted.

Mr. von Spakovsky also corrupted the established personnel practices that led to a productive working environment within the Section. He demanded that the Chief of the Section alter performance evaluations for career professionals because of disagreements with the legal or factual conclusions of career attorneys and differences with the recommendations they made, not the skill and professionalism with which these attorneys did their jobs. Such changes in performance evaluations by political appointees had never occurred in the past. There is good reason for giving deference to the section chief's judgment in performance given that political appointees lack the day to day work experience that a section chief possesses in his work with all members of the section. Not surprisingly, actions such as these undermined Section morale.

The matter which best demonstrates Mr. von Spakovsky's inappropriate behavior was his supervision of the review of a Georgia voter ID law in the summer of 2005. It demonstrates the unprecedented intrusion of partisan political factors into decision-making, the cavalier treatment of established Section 5 precedent of the Voting Section, and the unwarranted and vindictive retaliation against Voting Section personnel who disagreed with him on this matter.

Prior to his coming to the Civil Rights Division in 2001, Mr. von Spakovsky had vigorously advocated the need to combat the specter of voter fraud through restrictive voter identification laws. In testimony before legislative bodies and in his writings, Mr. von Spakovsky premised his conclusions upon the notion – not well-supported at the time and now discredited – that there was a widespread problem with ineligible voters streaming into the polling place to influence election outcomes. In this same period, starting in 1994, the Voting Section had on several occasions reviewed other voter ID laws pursuant to its responsibility under § 5 of the Voting Rights Act, to determine if they had a negative impact on the ability of minority voters to participate in elections. Precedent from these prior reviews was clear: changes requiring voters to provide government-issued photo identification without permitting voters to attest to their identity

if they did not have the required ID have a greater negative impact on minority voters than white voters because minority voters are less likely to have the government issued photo identification required by these laws.

Despite his firm position on voter ID laws and his partisan ties to his home state of Georgia, Mr. von Spakovsky refused to recuse himself from considering a Georgia law that would be the most restrictive voter identification law in the country. To the contrary, he was assigned the task of managing the process by the front office. Most disturbing was that just before the Department began consideration of the Georgia law, Mr. von Spakovsky published an article in a Texas law journal advocating for restrictive identification laws. Possibly understanding the impropriety of a government official taking a firm stand on an issue where he was likely to play a key role in the administrative decision concerning that issue, as the Department does under §5, Mr. von Spakovsky published the article under a pseudonym, calling himself "Publius." Such a situation -- where the position he espoused in an article that had just been published is directly related to the review of the Georgia voter ID law -- requires recusal from Section 5 review of this law, either by Mr. von Spakovsky or by his superiors. No such action was taken.

After careful review of the Georgia voter ID law, career staff responsible for the review came to a near unanimous decision, consistent with the precedent established by the Department in previous reviews; that the Georgia provision would negatively affect minority voting strength. Four of the five career professionals on the review team agreed. The one who did not had almost no experience in enforcing §5 and had been hired only weeks before the review began through the political hiring process described above. The recommendation to object to the law, detailed in a memo exceeding 50 pages was submitted on August 25, 2005. The next day, Georgia submitted corrected data on the number of individuals who had state-issued photo identification. The career review team was prevented by Mr. von Spakovsky from analyzing this data and incorporating the corrected data into their analysis. Instead, there was an unnecessary rush to judgment and the law was summarily precleared on August 26, the same day the corrected data had been submitted. Subsequent analysis of this data by a Georgia political scientist revealed that hundreds of thousands voters did not have the required voter ID, a disproportionate number of whom were poor, elderly and, most importantly for the Voting Rights Act review, minorities. In short, this data provided further evidentiary support for the objection recommended by professional staff. Subsequently, a federal court in Georgia found that this law violated the poll tax provision of the Constitution.

The personnel fallout after this review is at least as disturbing as the decision-making process. The Deputy Chief for the Section 5 unit who led the review, a 28 year Civil Rights Division attorney with nearly 20 years in the Voting Section, was involuntarily transferred to another job without explanation. The three other professionals who recommended an objection left the Voting Section after enduring criticism and retaliation, while the new attorney who was the only one not to recommend an objection received a cash award. The Section 5 unit suffered serious morale problems and it has lost at least four analysts with more than 25 years of experience, all of whom are African-

Americans. In addition, more than half of the Section's attorneys have left the Section since 2005.

Of equal concern, is an action taken against one of the career professionals on the Georgia review team, a career professional who had participated in the recommendation to object to the Georgia voter ID law. After the decision to preclear in August, 2005, this career employee filed a complaint with the Office of Professional Responsibility (OPR) directed at the inappropriate actions taken during this review, a complaint that remains pending, more than 18 months since it was filed. About three months later, Mr. von Spakovsky, along with Deputy Assistant Attorney General Bradley Schlozman, filed an OPR complaint against this employee. The complaint was based solely on emails that they had obtained from this person's records without his authorization. Such an intrusion of privacy is unprecedented in our experience and caused an increased level of distrust in the Voting Section. OPR recognized the frivolous nature of this complaint and dismissed it within three months.

Other decisions reflect similar inappropriate behavior. A unanimous recommendation to object to the unprecedented mid-decade redistricting plan that Texas submitted in 2003 by career staff was rejected by a team of political appointees that included Mr. von Spakovsky. Subsequently, the plan was found by the Supreme Court to violate the voting rights of Latino voters. Mr. von Spakovsky also rushed through a preclearance of the harsh and discriminatory Arizona voter ID and proof of citizenship law over the recommendation by career staff to seek more information to determine its impact on minority voters.

Mr. von Spakovsky's involvement concerning enforcement of the Help America Vote Act ("HAVA") raises several other concerns. He violated decades-long traditions and policies of the Voting Section against issuing advisory opinions by sending a series of letters to state officials which had the effect of forcing states to implement HAVA in an exceedingly restrictive way. For example, in one letter, he advocated for a policy keeping eligible citizens off the voter rolls for typos and other mistakes by election officials. When Washington State followed this advice, the rule was struck down by a federal court. He also usurped the role explicitly set forth in Section 214(a)(13) of HAVA that the Voting Section chief serve on the EAC Advisory Board, and exclusively handled, with no consultation of the section chief, all communications for the Division with the EAC. According to e-mails that have been made public, Mr. von Spakovsky tried to pressure the Chairman of the EAC, Paul deGregorio, to rescind a letter stating that Arizona had to accept federal voter registration forms that did not include documentary proof of citizenship. The emails further indicate that he proposed to the Chairman "trading" the EAC's rescinding the letter mentioned above for the Department's rescinding a letter the Civil Rights Division had earlier issued which improperly stated that Arizona voters had to provide identification before they could cast a provisional ballot. Mr. von Spakovsky's attempt to bargain over the interpretation of federal law was specifically criticized by Mr. DeGregorio.

Mr. von Spakovsky adopted the same restrictive approach during the 2004 election cycle when he once again broke with established Department policy by getting involved with contentious and partisan litigation on the eve of an election. Mr. von Spakovsky drafted legal briefs in lawsuits between the Republican and Democratic parties in three battleground states, Ohio, Michigan and Florida, just before the election, all in favor of the Republican party's position and included a position that the Civil Rights Division had never taken before with regards to statutes it enforces, i.e. that there was no private right of action to enforce HAVA. These briefs ran counter to the well-established practice of the Civil Rights Division not to inject itself into litigation or election monitoring on the eve of an election where it could be viewed as expressing a political preference or could have an impact on a political dispute. Moreover, in another case between the Republican and Democratic parties which concerned an Ohio law that permitted political parties to challenge voters, he drafted a letter that was sent to the court which supported the Republican Party position even though the law did not implicate any statute that the Department enforces.

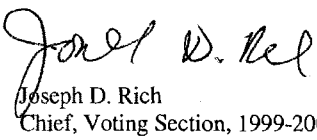
He also changed the enforcement direction of the Department regarding the National Voter Registration Act. In 2005, Mr. von Spakovsky introduced a new initiative to target states to demand that they purge their voter lists under Section 8 of the Act. This was done despite a lack of evidence that registration deadwood leads to invalid votes and instead of enforcing important federal requirements that states make voter registration more accessible to all its citizens. Moreover, the cases filed seeking large-scale purges were in states with a tight partisan split – like Missouri and New Jersey – rather than states like Texas and Utah where the rolls were equally or more inflated. A federal court in Missouri recently threw out the Department of Justice's complaint because the Department insisted on suing on only the (Democratic) Secretary of State, instead of those counties with actual deadwood problems, also noting that there was no evidence of voter fraud or evidence that any voter was denied the right to vote.

Finally, Mr. von Spakovsky never appeared to understand that his role as a Department of Justice attorney was to represent the "United States of America." Instead, on several occasions he took actions indicating a stubborn view that the Department represented the Bush Administration, the Republican Party or the Assistant Attorney General. For example in the *Georgia v. Ashcroft* litigation, Mr. von Spakovsky took a leading role in the case on remand. In that case, he proposed that the United States sign a joint co-counsel agreement with the defendant-intervenors – who were represented by top lawyers for the Georgia Republican Party -- which would have been an unprecedented and inappropriate political action. At a court hearing in the case he insisted on sitting at counsel with the Voting Section's attorneys but refused to file a notice of appearance for the United States, bizarrely claiming that he represented the Assistant Attorney General. Such a gross misunderstanding of the proper role of a Department of Justice attorney typifies his shortcomings

We have served the Department through Democratic and Republican administrations, consistently seeking to protect minority voters regardless of the impact of these actions on the political parties. While the priorities of the front offices in these administrations

change based on the results of the elections, never before has professionalism given way to partisanship. We may have disagreed with our front office colleagues, but those disagreements were given a forum and, between professionals, we found resolution. Mr. von Spakovsky and others in this front office violated the sacred rule that partisanship should be checked at the door of the Justice Department so the business of protecting the American people through federal law enforcement can be honored without prejudice. We urge you to explore Mr. von Spakovsky's role in this unfortunate endeavor and refuse to reward him for this dubious stewardship.

Sincerely,



Joseph D. Rich
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Civil Rights Division Attorney, 1968-2005

Robert A. Kengle
Deputy Chief, Voting Section, 1999-2005
Voting Section Attorney. 1984-2005

Jon Greenbaum
Senior Trial Attorney, Voting Section, 1997-2003

David J. Becker
Senior Trial Attorney, Voting Section, 1998-2005

Bruce Adelson
Senior Trial Attorney, Voting Section, 2000-2005

Toby Moore
Political Geographer, Voting Section, 2000-2006

June 18, 2007

The Honorable Dianne Feinstein
The Honorable Bob Bennett
Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
Washington, DC 20510

Dear Chairperson Feinstein and Ranking Member Bennett:

We are writing as a follow up to our letter of June 11 in opposition to Mr. Hans von Spakovsky's nomination to the Federal Election Commission (FEC). We have reviewed his testimony to the Committee on June 13 and write to address some concerns we have over these statements.

Specifically, the following areas of testimony conflict with our recollection of events at the Voting Section in the Department of Justice's Civil Rights Division:

1. Mr. von Spakovsky attempted to paint a picture of his role in the Civil Rights Division's front office as one of a simple "middle manager," merely providing legal advice and recommendations to his superiors and then delivering the decisions made by his superiors to Voting Section staff.

   This characterization differs significantly from our experience with Mr. von Spakovsky. From the time he assumed the role of Counsel to the Assistant Attorney General in early 2003 until he left in December 2005, Mr. von Spakovsky spent virtually all of his time on voting matters and assumed the role of de facto Voting Section chief replacing the career Section Chief in most of his statutory responsibilities and traditional duties managing the Section. Mr. von Spakovsky assumed a position on the EAC Advisory Board that was reserved explicitly by Section 214(a)(13) of the Help America Vote Act (HAVA) for "the chief of the voting section . . . or the chief's designee" even though the Section chief had never designated Mr. von Spakovsky for this position; assigned staff to cases; took over lead review in a major case; rewrote performance evaluations of career staff; and set Section priorities. During our combined tenure at the Voting Section, we have never seen a political appointee exercise this level of control over the day to day operations of the Voting Section. Indeed, testimony previously given by Bradley Scholzman, Mr. von Spakovsky's supervisor, to the Senate Judiciary Committee reinforces

the degree to which front office oversight of the Section was delegated to Mr. von Spakovsky.

Moreover, as discussed in our June 11 letter, he consistently used this position to promote partisan political interests through narrow interpretations of HAVA, refocusing the Department's National Voter Registration Act (NVRA) enforcement activities, refusing to allow investigations under the Voting Rights Act based on discrimination in African-American and Native American communities, and redirecting limited resources to a partisan search for unsubstantiated allegations of voter fraud.

2. Mr. von Spakovsky conceded that he wrote an April 15, 2005 letter to Arizona, which opined that the state did not need to provide provisional ballots to voters who did not present identification when voting. This was a reversal of the Division's previous interpretation, and in direct conflict with the letter and spirit of HAVA. In fact, five months later Mr. von Spakovsky admitted drafting another letter reversing this position after a disagreement with the Election Assistance Commission that led one of the EAC's commissioners to protest that Mr. von Spakovsky was unnecessarily pressuring him to change his position on the issue.

In addition, contrary to his testimony, Mr. von Spakovsky did not seek information or input from career staff when he wrote the April 15, 2005 letter. After the April 15 letter was received by Arizona, an Arizona government official contacted Voting Section career staff seeking more information about the Department's new position on provisional balloting. Neither the attorney who fielded the call nor the Section chief had ever seen nor heard of the letter. The Section chief sent an email to other staff attorneys about the letter and none had seen nor heard of it. The Section chief called then-Assistant Attorney General Alex Acosta for an explanation of why and under what process the policy of the Section on provisional ballots had changed. Mr. Acosta indicated to the Section chief that he had never seen this letter.

According to the letter's signature, the policy was approved by former Principal Deputy Assistant Attorney General Sheldon Bradshaw. Curiously, however, Mr. Bradshaw left the Division approximately five days before the letter was sent.

3. Mr. von Spakovsky testified that he received approval from appropriate Department officials before he published *Securing the Integrity of American Elections: The Need for Change, 9 Tex. Rev. Law & Pol. 277*. The article, which advocated on behalf of restrictive

voter identification provisions, was published at about the same time that Mr. von Spakovsky began his active role in the Section's consideration of a similarly restrictive measure in Georgia.

Despite Mr. von Spakovsky's implication that publication of the article was pursuant to Department of Justice policy, our experience over decades and multiple administrations was decidedly different. Traditional practice when officials at the Department write scholarly articles is for those articles to be signed by the author and to include a disclaimer that the views in the article do not necessarily reflect the views of the Department.

It is clear from his explicit views in the article that his mind was made up about identification provisions and how they relate to voting, yet neither he nor his superiors (whom he testified were aware of the publication of the article), took steps to recuse him from consideration of the proposed Georgia law. Moreover, the views expressed in the article were consistent with his unwillingness to consider evidence that weighed against preclearance in the Georgia submission.

The role of the Department in reviewing voting laws submitted to the Attorney General under Section 5 of the Voting Rights Act is the same as the District Court of the District of Columbia when a jurisdiction decides to file a Section 5 declaratory judgment action. See 42 U.S.C. § 1973c. Indeed, a decision to preclear cannot be reviewed by a court. Participating in the preclearance process while serving as a vigorous advocate for provisions like this across the country created an insurmountable conflict of interest.

4. We are also concerned with Mr. von Spakovsky's characterization of the shifting enforcement priority established under the voter purge program he directed in 2005 During our tenure, Mr. von Spakovsky rejected requests from several voting rights advocacy groups to enforce that part of the National Voter Registration Act (NVRA) which requires social service agencies to provide voter registration opportunities, despite the fact that there is substantial evidence that registration at social service agencies has plummeted during this administration. This type of activity expands the right to vote, especially for minorities and the disabled, and yet Mr. von Spakovsky placed no resources into this area and no cases were filed. Instead, Mr. von Spakovsky shifted the Voting Section's NVRA enforcement priorities to enforcement of the voter purge provisions of the law. This was problematic as the pressure on states to purge their voter rolls came at the same time as state election officials were implementing new, often unprecedented statewide voter registration databases. Moreover, in at least two instances (Washington and

Missouri), the positions he pushed encouraging voter purges were rejected by federal district courts.

5. Mr. von Spakovsky testified he had very little memory of the 2004 incident involving a directive of the Minnesota Secretary of State regarding voter identification for Native American voters who do not live on reservations. It is likely that the directive would have disenfranchised thousands of Native American voters had a federal court not found it discriminatory.

Mr. von Spakovsky testified that he failed to recollect this particular matter because it was one of a deluge of requests that flooded the Voting Section in the run up to the election. This matter, however, received unique treatment from Mr. von Spakovsky and his colleagues in the front office. On no other occasion was the Section Chief told that a matter was especially "sensitive" nor that each step of an investigation had to be approved by Mr. von Spakovsky or by Mr. Schlozman.

Furthermore, Mr. von Spakovsky testified that he thought it made sense to restrict the Section's contact on the matter to the Secretary of State rather than the Hennepin or Ramsey County Boards of Elections who registered the complaint with the U.S. Attorney's office. According to his testimony, Mr. von Spakovsky restricted the contact out of an interest in expediency, because the Secretary of State issued the directive. However, at the time, Mr. von Spakovsky communicated to the Section chief that it would be better to call the Secretary of State to avoid a leak. It is important to note that interviewing Hennepin and/or Ramsey county election officials was necessary to find what they had actually been told by the Secretary of State.

6. Mr. von Spakovsky defended his enforcement record by alluding to two Section 2 cases that had been approved internally but were never filed in court because of a subsequent change in circumstances. It is inconsistent that Mr. von Spakovsky discussed internal decision-making when testifying about these cases while at the same time asserting that nebulous claims of privilege prevented him from answering the Committee's questions concerning his recommendations in the Georgia and Texas matters. More importantly, he did not mention the several matters in which Voting Section staff recommended lawsuits be brought on behalf of African-American and other minority voters (each with a strong evidentiary record requiring action) that the front office either refused to approve, or on which they unnecessarily delayed action for as long as a year and a half. Nor did he mention an important policy change

concerning approval of Section 2 investigations. Until Mr. von Spakovsky came to the front office, the Section chief had authority to approve such investigations, but at about the same time as his arrival in the front office in 2003, the policy was changed, requiring Mr. von Spakovsky's approval for all such investigations. This led to far fewer investigations and occasions when requests to merely begin an investigation into a matter were rejected.

Finally, we want to respond to a suggestion made during the hearing that the signatories of the June 11 letter had their own partisan interests in mind in writing to the Committee and advocating for the defeat of Mr. von Spakovsky's nomination. As we have mentioned before, we served proudly through Republican administrations and Democratic administrations. We welcome discussion about ideas and relish intelligent debate about principles, but as civil servants we committed ourselves to enforcing federal civil rights laws without fear or favor. We were required to be apolitical while protecting a political process. We relished that challenge. Our decisions sometimes disappointed Democrats and sometimes disappointed Republicans, but always honored our belief that it is the *voters* who are protected by the statutes the Section enforces, not the political parties. We oppose Mr. von Spakovsky's nomination because he made it impossible for us to carry out that essential mission in our service at the Voting Section.

We appreciate the Committee's commitment to uncovering the role that Mr. von Spakovsky played in the changing priorities and policies within the Voting Section and in the politicization of the Civil Rights Division. We are committed to preserving the legacy, potential and commitment of the career civil servants who have dedicated their lives to protecting our nation's Civil Rights. Unfortunately, the changes that Mr. von Spakovsky oversaw at the Department threaten that tradition. We look forward to your continued investigation into his role in initiating that change.

Sincerely,

Joseph D. Rich
Chief, Voting Section, 1999-2005
Civil Rights Division Attorney, 1968-2005

Robert A. Kengle
Deputy Chief, Voting Section, 1999-2005
Voting Section Attorney, 1984-2005

Stephen B. Pershing
Senior Trial Attorney, Voting Section 1996-2005

Jon Greenbaum
Senior Trial Attorney, Voting Section, 1997-2003

David J. Becker
Senior Trial Attorney, Voting Section, 1998-2005

Bruce Adelson
Senior Trial Attorney, Voting Section, 2000-2005

Toby Moore
Political Geographer, Voting Section, 2000-2006

Department of Justice

STATEMENT OF

WAN J. KIM
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"CIVIL RIGHTS DIVISION OVERSIGHT"

PRESENTED

JUNE 21, 2007

Statement of
Wan J. Kim
Assistant Attorney General
Civil Rights Division
Department of Justice

Before the
Committee on the Judiciary
United States Senate

Concerning
"Civil Rights Division Oversight"

June 21, 2007

Thank you. Mr. Chairman, Ranking Member Specter, Members of the Committee, it is a pleasure to appear before you to represent President Bush, Attorney General Gonzales, and the dedicated professionals of the Civil Rights Division.

I am honored to serve the people of the United States as Assistant Attorney General for the Civil Rights Division. I am pleased to report that the past year has been full of outstanding accomplishments in the Civil Rights Division, where we obtained many record levels of enforcement. I am proud of the professional attorneys and staff in the Division – men and women whose talents, dedication, and hard work made these accomplishments possible.

This year, the Division celebrates its 50th Anniversary. Consequently, I have reflected upon the work of the Division not only during my own time of service but also over the past half-century. Since our inception in 1957, the Division has achieved a great deal, and we have much of which to be proud. While citizens of all colors, from every background, living in all pockets of the country – rural, urban, north, and south – have seen gains made on the civil rights front, one need not look back very far to recall a very different landscape.

This point was made more vivid for me when I traveled with Attorney General Gonzales to Birmingham, Alabama, last year. We attended the dedication of the 16th Street Baptist Church as a National Historic Landmark. In 1963, racists threw a bomb in this historically black church, killing four little girls who were attending Sunday School. Horrific incidents like this sparked the passage of the Civil Rights Act of 1964 – the most comprehensive piece of civil rights legislation passed by Congress since Reconstruction. While much has been achieved under that piece of legislation and other civil rights laws, the Division's daily work demonstrates that discrimination still exists. There is still much work to be done, but we are working toward the goal famously described by Dr. Martin Luther King of a society rid of discrimination, where people are to be judged on the content of their character and not the color of their skin.

NEW INITIATIVE: THE FIRST FREEDOM PROJECT

On February 20, 2007, the Attorney General announced a new initiative, entitled *The First Freedom Project*, and released a *Report on Enforcement of Laws Protecting Religious Freedom: Fiscal Years 2001 to 2006. The First Freedom Project* includes creation of a Department-wide Religious Liberty Task force, a series of regional seminars on Federal Laws Protecting Religious Liberty to educate community, religious, and civil rights leaders on these rights and how to file complaints with the Department of Justice, and a public education campaign that includes a new website, www.FirstFreedom.gov, speeches and other public appearances, and distribution of literature about the Department's jurisdiction in this area.

Most of the civil rights statutes the Division enforces protect against discrimination on the basis of religion along with race, national origin, sex, disability, and other protected classifications. Yet prior to this Administration, no individual at the Department coordinated the protection of religious liberties. In 2002, we established, within the Civil Rights Division, a Special Counsel for Religious Discrimination to coordinate the protection of religious liberties. We have won virtually every religious discrimination case in which we have been involved and have increased the enforcement of religious liberties throughout the areas of our jurisdiction.

The Civil Rights Division reviewed 82 cases of alleged religious discrimination in education from Fiscal Year 2001 to Fiscal Year 2006, resulting in 40 investigations. This is compared to one review and one investigation in the prior six-year period. In Fiscal Year 2006, the Division reviewed 22 cases and investigated 13. The largest category of cases involved harassment of students based on religion. Of the 13 investigations in Fiscal Year 2006, eight involved harassment claims. Seven of these involved Muslim students. In the Division's most recent education case, on May 14, 2007, we reached a settlement with a Texas school district that permits a group of Muslim high school students to gather for midday prayer in an area outside of the cafeteria where other groups of students and clubs had been permitted to gather.

Similarly, we have been active in a broad range of cases involving religious discrimination in employment. We currently have a pattern or practice suit under Title VII against the New York Metropolitan Transit Authority, alleging that it failed to accommodate Muslim and Sikh bus and train operators who wear religious headcoverings and has selectively enforced its uniform policies. In *United States v. Los Angeles County Metropolitan Transportation Authority*, the Division sued the Los Angeles MTA, alleging that it had engaged in a pattern or practice of religious discrimination by failing to reasonably accommodate Sabbath-observant employees and applicants who were unable to comply with MTA's requirement that they be available to work seven days a week. The Division reached a consent decree in October 2005 requiring Sabbath accommodations.

While many of these cases involved straightforward religious discrimination, the Division also has sought to prevent harassment based on religion. For example, in January 2006, we reached a consent decree in a Fair Housing Act case against a Chicago man for harassing his next-door neighbors because of their Jewish religion and their national origin. The Division also has been active in preventing discrimination based on religion in access to public

accommodations and public facilities under Titles II and III of the Civil Rights Act of 1964. Investigations under these two statutes increased from one in 1995-2000 to ten in 2001-2006. For example, in the area of public accommodations, we reached a settlement with a restaurant in Virginia that had denied service to two Sikh men because of their turbans. In the area of access to public facilities, we investigated the city of Balch Springs, Texas, after officials told seniors at a city senior center that they could no longer pray before meals, sing gospel music, or hold Bible studies, all of which were initiated by the seniors themselves without the involvement of any city employees. The city settled and agreed to permit seniors to engage in religious expression to the same extent that they can engage in other forms of expression at the center.

The Civil Rights Division also has been active in enforcing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). The Division has reviewed more than 130 complaints and has opened more than 30 formal investigations under RLUIPA. The majority of these investigations have been resolved favorably without filing suit. These cases have involved Muslims, Sikhs, Buddhists, Jews, Hindus, and Christians of various denominations.

We also have filed four RLUIPA lawsuits. The most recent, filed in September 2006, involves Suffern, New York's refusal to permit an Orthodox Jewish group to operate a "Shabbos House" next to a hospital where Sabbath-observant Jews who cannot drive on the Sabbath can stay the night if they are discharged from the hospital on the Sabbath or if they are visiting patients on the Sabbath. In July 2006, the Division also reached a consent decree in *United States v. Hollywood, Florida*, which involved allegations of discrimination in denial of a permit to a synagogue to operate in a residential neighborhood.

The Division also has been active in filing amicus briefs in RLUIPA cases and defending RLUIPA's constitutionality. In August 2006, the U.S. Court of Appeals for the Ninth Circuit ruled in favor of the United States in *Guru Nanak Sikh Society v. County of Sutter*. In that case, the Division had intervened to defend the constitutionality of RLUIPA and filed an amicus brief on the merits in a case involving a Sikh congregation that was denied permits to build a Gurdwara in both residential and agricultural neighborhoods.

Of particular note are the Division's efforts to combat "backlash" crimes following the September 11, 2001, terrorist attacks. Under this initiative, the Division investigates and prosecutes backlash crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. This initiative has led to numerous prosecutions involving physical assaults, some involving dangerous weapons and resulting in serious injury or death, as well as threats made over the telephone, on the internet, through the mail, and in person. We also have prosecuted cases involving shootings, bombings, and vandalism directed at homes, businesses, and places of worship. The Department has investigated more than 750 bias-motivated incidents since September 11, 2001, and we have obtained 33 Federal convictions in such cases. We also have assisted local law enforcement in bringing more than 150 such criminal prosecutions.

Two recent examples of our backlash prosecutions are *United States v. Oakley*, in which the defendant pled guilty to emailing a bomb threat to the Council on American Islamic

Relations, and *United States v. Nix*, in which the defendant detonated an explosive device in a Pakistani family's van that was parked outside their home. The defendant set off the explosive with intent to interfere with the family's housing rights. These backlash crimes, and others we have prosecuted since September 11, 2001, are an unfortunate reality of American life today. As President Bush has stated, "those who feel like they can intimidate our fellow citizens to take out their anger don't represent the best of America, they represent the worst of humankind, and they should be ashamed of that kind of behavior."

In recent years, the Division has continued its investigations and prosecution of church-burning cases. In addition, anti-Semitic attacks remain a persistent problem in the United States. We recently obtained guilty pleas from five men in Oregon for conspiring to intimidate Jews at the Temple Beth Israel in Eugene, Oregon. Defendants threw swastika-etched rocks at the synagogue, breaking two stained glass windows, while 80 members of the synagogue were inside attending a religious service. On April 3, 2007, the lead defendant was sentenced to more than 11 years for his role in the attack and his efforts to obstruct the prosecution.

We are proud of the First Freedom Project, as well as other Attorney General initiatives involving the work of the Civil Rights Division. These include the Department's Cold Case Initiative, Operation Home Sweet Home, and Human Trafficking prosecutions, as discussed in greater detail below.

PROTECTING VOTING RIGHTS

The right to vote is the foundation of our democratic system of government. The President and the Attorney General strongly supported the Voting Rights Act Reauthorization and Amendments Act of 2006, named for three heroines of the Civil Rights movement, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King. During the signing ceremony at the White House, President Bush said, "My administration will vigorously enforce the provisions of this law, and we will defend it in court." The Civil Rights Division is committed to carrying out the President's promise. In fact, the Division is already defending the Act against a constitutional challenge in Federal court here in the District of Columbia.

The Civil Rights Division is responsible for enforcing several laws that protect voting rights, and I will discuss the Division's work under each of those laws. First, however, it is worth noting that under our nation's Federal system of government, the primary responsibility for the method and manner of elections lies with the States. Article I, Section 4, of the Constitution states, "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof." Thus, each State holds responsibility for conducting its own elections. However, Article I, Section 4, goes on to provide: "[B]ut the Congress may at any time by Law make or alter such Regulations" with respect to Federal elections. The Fourteenth and Fifteenth Amendments likewise authorize congressional action in the elections sphere. Therefore, except where Congress has expressly decided to legislate otherwise, States maintain responsibility for the conduct of elections.

Congress has passed legislation in certain distinct areas related to voting and elections. These laws include, among others, the Voting Rights Act of 1965 and subsequent amendments thereto, the Uniformed and Overseas Citizen Absentee Voting Act of 1986 (UOCAVA), the National Voter Registration Act of 1993 (Motor Voter or NVRA), and the Help America Vote Act of 2002 (HAVA). The Civil Rights Division enforces the civil provisions of these laws. The vast majority of criminal matters involving possible Federal election offenses are assigned to and supervised by the Criminal Division and are prosecuted by the United States Attorneys' Offices. However, a small percentage of voting-related offenses are principally assigned to the Civil Rights Division to handle or supervise.

During my tenure as the Assistant Attorney General, the Voting Section has brought lawsuits under each of the statutes referenced in the previous paragraph. In fact, the 18 new lawsuits we filed in Calendar Year 2006 are double the average number of lawsuits filed annually in the preceding 30 years. Additionally, because 2006 was a Federal election year, the Division worked overtime to meet its responsibilities to protect the voting rights of our citizens.

In 2006, the President signed the Voting Rights Act Reauthorization and Amendments Act of 2006, which renewed for another 25 years certain provisions of the Act that had been set to expire. The Voting Rights Act has proven to be one of the most successful pieces of civil rights legislation ever enacted. However, as long as all citizens do not have equal access to the polls, our work is not finished. As President Bush said, "In four decades since the Voting Rights Act was first passed, we've made progress toward equality, yet the work for a more perfect union is never ending."

The Civil Rights Division is committed to ensuring that all citizens have equal access to the democratic process. During Fiscal Year 2006, the Division's Voting Section continued to aggressively enforce all provisions of the Voting Rights Act, filing eight lawsuits to enforce various provisions of the Act. These cases include a lawsuit that we filed and resolved under Section 2 against Long County, Georgia, for improper challenges to Hispanic-American voters – including at least three United States citizens on active duty with the United States Army – based entirely on their perceived race and ethnicity. We also filed a Section 2 lawsuit in 2006 on behalf of African-American voters that challenges the method of election in Euclid, Ohio. This case is currently in litigation and is scheduled to go to trial on August 6, 2007.

Among our recent successes under Section 2 is the Division's lawsuit against Osceola County, Florida, where we brought a challenge to the county's at-large election system. In October 2006, we prevailed at trial. The court held that the at-large election system violated the rights of Hispanic voters under Section 2 and ordered the county to abandon it. In December, the court adopted the remedial election system proposed by the United States and ordered a special election under that election plan to take place this spring. Our most recent Section 2 accomplishment is the preliminary injunction obtained in our challenge to Port Chester, New York's at-large election system. On March 2, 2007, after an evidentiary hearing, the court enjoined the March 20 elections, holding that the United States was likely to succeed on its claim. Trial concluded on June 5. Also, this January, in Fremont County, Wyoming, the Division successfully defended the constitutionality of Section 2 of the Voting Rights Act, for

the third time in this Administration. Also in 2007, the Division has filed and resolved a claim under Section 2 involving discrimination against Hispanic voters at the polls in Philadelphia, and we have obtained additional relief in an earlier Section 2 suit on behalf of Native American voters in Cibola County, New Mexico.

The actions against Philadelphia and Cibola County are noteworthy because both involve claims not only under the Voting Rights Act, but under HAVA and the NVRA as well. In Cibola County, which initially involved claims under Sections 2 and 203, we brought additional claims after the County failed to process voter registration applications of Laguna Pueblo and other Native American voters, removed Native American voters from the rolls without the notice required by the NVRA, and failed to provide provisional ballots to Native American voters in violation of HAVA. In Philadelphia, we added to our original Section 203 and 208 claims additional counts under Sections 2 and 4(e) of the Act to protect Hispanic voters, a count under the NVRA pursuant to which the City has agreed to remove the names of over 10,000 dead persons from the rolls, and a count under HAVA to assure that accessible machines are available to voters with disabilities.

The Section also continues to litigate a case in Mississippi under Sections 2 and 11(b) of the Voting Rights Act. This case is unusual for several reasons: it is the most extreme case of racial exclusion seen by the Voting Section in decades; the racial discrimination is directed against white citizens; and we are not aware of any other case in which the Voting Section has had to move for a protective order to prevent intimidation of witnesses. This case was tried in January of this year, and we are awaiting a ruling on the liability issue.

We will continue to closely investigate claims of voter discrimination and vigorously pursue actions on behalf of all Americans wherever violations of Federal law are found.

The Division also had a record-breaking year in 2006 with regard to enforcement of Section 208 of the Voting Rights Act. As the Committee knows, Section 208 assures all voters who need assistance in marking their ballots the right to choose a person they trust to provide that assistance. Voters may choose any person other than an agent of their employer or union to assist them in the voting booth. In Calendar Year 2006, the Division's Voting Section brought four out of the nine lawsuits filed under Section 208 since it was enacted twenty-five years ago; during the past six years, we have brought seven of the nine such cases, including the first case ever under the Voting Rights Act to protect the rights of Haitian Americans.

In 2006, the Voting Section processed the largest number of Section 5 submissions in its history. The Division made two objections to submissions pursuant to Section 5, in Georgia and Texas, and filed its first Section 5 enforcement action since 1998. The Division also made an objection pursuant to Section 5 in Alabama in January 2007. Additionally, the Division is vigorously defending the constitutionality of Section 5 of the Voting Rights Act in an action brought by a Texas jurisdiction and recently filed an amicus brief in a Mississippi Section 5 case. We also consented to several actions in Fiscal Year 2006 in jurisdictions that satisfied the statutory requirements for obtaining a release, or "bailout," from Section 5 coverage. The Voting Section has begun a major enhancement of the Section 5 review process to minimize

unnecessary paperwork involved with submissions, make improvements in training, and expand its outreach.

The Division also has made a major technological advance in Section 5 with our new e-Submission program. Now, state and local officials can make Section 5 submissions on-line. This will make it easier for jurisdictions to comply, encourage complete submissions, ease our processing of submissions, and allow the Voting Section staff more time to study the changes and identify those that may be discriminatory.

Our commitment to enforcing the language minority requirements of the Voting Rights Act, reauthorized by Congress last summer, remains strong, with five lawsuits filed in Calendar Year 2006. In April 2007, the Division filed the first lawsuit under Section 203 on behalf of Korean Americans in the City of Walnut, California. During the past 6 years, the Civil Rights Division has litigated more cases under the minority language provisions than in all other years combined since 1965. Specifically, we have successfully litigated approximately 60 percent of all language minority cases in the history of the Voting Rights Act.

Our cases on behalf of language minority voters have made a remarkable difference in the accessibility of the election process to those voters. As a result of our lawsuit, Boston now employs five times more bilingual poll workers than before. As a result of our lawsuit, San Diego added over 1,000 bilingual poll workers, and Hispanic voter registration increased by over 20 percent between our settlement in July 2004 and the November 2004 general election. There was a similar increase among Filipino voters, and Vietnamese voter registration rose 37 percent. Our lawsuits also spur voluntary compliance: after the San Diego lawsuit, Los Angeles County added over 2,200 bilingual poll workers, an increase of over 62 percent. In many cases, violations of Section 203 are accompanied by such overt discrimination by poll workers that Section 2 claims could have been brought as well. However, we have been able to obtain complete and comprehensive relief through our litigation and remedies under Section 203 without the added expense and delay of a Section 2 claim.

During Fiscal Year 2006, the Division continued to work diligently to protect the voting rights of our nation's military and overseas citizens. The Division has enforcement responsibility for UOCAVA, which ensures that overseas citizens and members of the military, and their household dependents, are able to request, receive, and cast a ballot for Federal offices in a timely manner for Federal elections. As a result of our efforts, in Fiscal Year 2006, the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. In Calendar Year 2006, we filed successful UOCAVA suits in Alabama, Connecticut, and North Carolina and reached a voluntary legislative solution without the need for litigation in South Carolina. In Alabama and North Carolina, we obtained relief for military and overseas voters in the form of State legislation. We also obtained permanent relief in the form of legislation in a suit originally filed against Pennsylvania in 2004. All of these accomplishments prompted an award from the Department of Defense to the Deputy who supervised all of these cases. The Civil Rights Division will continue to make every effort to ensure that our citizens abroad and the brave men and women of our military are afforded a full opportunity to participate in Federal elections.

In 2006, the Voting Section also filed the largest number of suits under the National Voter Registration Act since shortly after the Act became effective in 1995. We filed lawsuits in Indiana, Maine, and New Jersey. The Voting Section's suits against New Jersey and Maine also alleged violations of the Help America Vote Act (HAVA). We resolved these two suits with settlement agreements that set up timetables for implementation of a statewide computer database. The suit against Indiana, which admitted that its lists contained more than 300,000 ineligible voters, also was settled by consent decree. We have appealed an adverse ruling in a 2005 suit against Missouri regarding its failure, over the course of many years, to appropriately implement the NVRA's provisions regarding adding and removing voters from its voter rolls. The State's failure in that regard resulted in counties removing voters who should have been kept on the rolls, and keeping voters who should have been removed. These failures caused dozens of jurisdictions to report that voter registrations exceeded the total number of citizens eligible to vote; in one case the voter rolls were 151% of the county's voting age population, and in two counties the number of people registered to vote exceeded the total county population. More recently, as noted above, we filed suit and entered into a consent decree against a New Mexico county where the victims of the NVRA violations were primarily Native-American voters. Finally, we received a favorable decision in our lawsuit against New York for its failure to designate disability services offices that serve disabled students as mandatory voter registration offices. The court largely denied the defendants' motion to dismiss, and the case is currently in litigation.

With January 1, 2006, came the first year of full, nationwide implementation of the database and accessible voting machine requirements of HAVA. Accordingly, we began making these statutory requirements a priority for enforcement. HAVA requires that each State and territory have a statewide computerized voter registration database in place for Federal elections, and that, among other requirements, there be accessible voting for the disabled in each polling place in the nation. Many States, however, did not achieve full compliance and are struggling to catch up. States missed these deadlines for many reasons, including ineffective time lines, difficulty resolving compliance issues, and various problems with vendors.

The Division worked hard to help States prepare for the effective date of January 1, 2006, through speeches and mailings to election officials, responses to requests for our views on various issues, and maintaining a detailed website on HAVA issues. We have been, and remain, in close contact with many States in an effort to help them achieve full compliance at the earliest possible date.

A significant example of the success of the Division's cooperative approach in working with States on HAVA compliance came in our agreement with California on compliance with HAVA's database provisions. Prior to the January 1, 2006, deadline, the Voting Section reached an important memorandum of agreement with California regarding its badly stalled database implementation. California's newly appointed Secretary of State sought the Division's help to work cooperatively on a solution, and the Division put significant time and resources into working with the State to craft a feasible agreement providing for both interim and permanent

solutions. We are very proud of this agreement, which has served as a model for other States in their database compliance efforts.

Where cooperative efforts prove unsuccessful, the Division enforces HAVA through litigation. During 2006, the Section filed lawsuits against the States of New York, Alabama, Maine, and New Jersey. In New York and Maine, the States had failed to make significant progress on both the accessible voting equipment and the statewide databases. In Alabama and New Jersey, the States had not yet implemented HAVA-compliant statewide databases for voter registration. The Section ultimately obtained a favorable judgment and order in Alabama, a preliminary injunction and the entry of a remedial order in New York, and favorable consent decrees in Maine and New Jersey. In addition, we filed a local HAVA claim against an Arizona locality for its failure to follow the voter information posting requirements of HAVA, as well as the recent lawsuits in Cibola County, New Mexico, and Philadelphia, Pennsylvania, discussed above, to protect Native American and disabled voters, respectively. The Section also defended three challenges to HAVA in a private suit involving the HAVA accessible machine requirement. A separate Pennsylvania State court judgment barring the use of accessible machines was overturned after the Division gave formal notice of its intent to file a Federal lawsuit.

A major component of the Division's work to protect voting rights is its election monitoring program, which is among the most effective means of ensuring that Federal voting rights are respected on election day. Each year, the Justice Department deploys hundreds of personnel to monitor elections across the country. Last year, the Division deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. In total, over 800 Federal personnel monitored the polls in 69 political subdivisions in 22 States during the general election on November 7, 2006 – a record level of coverage for a mid-term election. In Calendar Year 2006, we sent over 1,500 Federal personnel to monitor elections, doubling the number sent in 2000, a presidential election year.

Such extensive efforts require substantial planning and resources. Our decisions to deploy observers and monitors are made carefully and purposefully so that our resources are used where they are most needed. To that end, I personally met with representatives of a number of civil rights organizations prior to the 2006 general election, including organizations that advocate on behalf of racial and language minorities, as well as groups who focus on disability rights. During these meetings, I encouraged these groups to share information about their concerns with us so that we could respond appropriately where needed. We made a detailed presentation about the Division's preparations for the general election and our election day activities, distributed information about how to request monitoring for a jurisdiction, and explained how to contact us on election day through our toll free number and internet-based complaint system. I also met with representatives from the National Association of Attorneys General, the National Association of Secretaries of State, and other representatives of similar associations before last year's general election. This meeting provided a forum for discussion of State and local officials' concern, and for the Division to provide information about our election day plans.

On election day, Department personnel here in Washington stood ready. We had numerous phone lines ready to handle calls from citizens with election complaints, as well as an internet-based mechanism for reporting problems. We had personnel at the call center who were fluent in Spanish and the Division's language interpretation service to provide translators in other languages. On election day, the Voting Section received approximately 141 calls and 88 e-mail complaints on its website. These 229 complaints resulted in approximately 332 issues raised, as some complainants had multiple issues. Many of these complaints were subsequently resolved on election day; we continue the process of following-up on the rest.

The improvements to our monitoring program have increasingly resulted in enforcement actions. Lawsuits that benefited from evidence obtained in monitoring include, but are by no means limited to, those against the following jurisdictions: San Diego County, California; Osceola County, Florida; City of Boston, Massachusetts; City of Rosemead, California; Brazos County, Texas; Philadelphia, Pennsylvania; City of Walnut, California; and Cibola County, New Mexico. Our monitoring work has paid off, and we are laying the groundwork for 2008 even today.

CRIMINAL CIVIL RIGHTS PROSECUTIONS

The Civil Rights Division's Criminal Section continues to vigorously enforce Federal criminal civil rights protections, having set prosecution records in several areas in Fiscal Year 2006. Our overall conviction rate rose from 91% in Fiscal Year 2005 to 98% in Fiscal Year 2006 – the highest conviction rate recorded in the past two decades. We also charged 201 defendants with civil rights violations and obtained convictions of 180 defendants in Fiscal Year 2006 – both of which represent the highest totals in over two decades.

Our criminal prosecutions span the full breadth of the Division's jurisdiction. In color of law matters, we filed 44 cases (up from 29 the previous year) and charged 66 defendants (compared to 45 in the previous year) in Fiscal Year 2006. Additionally, we charged 22 defendants in cases of bias crime, including charges of conspiracy, murder, and post-September 11, 2001, "backlash" crimes.

As the Committee is aware, there has been renewed interest in the investigation and prosecution of unsolved civil rights era murder cases. The Criminal Section continues to play a central role in this effort. In January 2007, the Attorney General announced the indictment of James Seale on two counts of kidnapping and one count of conspiracy for his role in the 1964 abduction and murder of Charles Moore and Henry Dee in Franklin County, Mississippi. A federal jury returned guilty verdicts against Seale on all three counts just one week ago, on June 14, 2007. And, in February 2007, the Attorney General and the FBI announced an initiative to identify other unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of Federal law.

Our human trafficking efforts continue at an unprecedented pace. Working with the various United States Attorneys' Offices, the Civil Rights Division charged 111 defendants in 32

cases and obtained 98 convictions in Fiscal Year 2006, a record number that nearly tripled the number of convictions in the previous year. From Fiscal Year 2001 to Fiscal Year 2006, the Division, in conjunction with U.S. Attorney's offices, prosecuted 360 human trafficking defendants, secured almost 240 convictions and guilty pleas, and opened nearly 650 new investigations. That represents a six-fold increase in the number of human trafficking cases filed in court, quadruple the number of defendants charged, and triple the number of defendants convicted in comparison to 1995-2000. On January 31, 2007, the Attorney General and I announced the creation of the new Human Trafficking Prosecution Unit within the Criminal Section. This new Unit is staffed by the Section's most seasoned human trafficking prosecutors who will work with our partners in Federal and State law enforcement to investigate and prosecute the most significant human trafficking crimes, such as multi-jurisdictional sex trafficking cases.

Color of Law Violations

There is no doubt that law enforcement officers are asked to perform dangerous and difficult tasks to serve and protect our citizens. We ask these brave men and women to perform their duties with a professionalism that keeps us all safe from harm and places a great deal of public trust in them. I have no doubt that the overwhelming majority of law enforcement officers and State agents are deeply committed to protecting the private citizens and maintaining the integrity of the public trust. I think we all owe these hard-working men and women a deep sense of gratitude. Unfortunately, there are some who abuse their positions of trust to mistreat those in custody. Such unlawful behavior undermines the tireless efforts of the vast majority of law enforcement officers who perform a tough job with professionalism and courage. When an individual acting under the color of law abuses a position of authority and violates the law, the Civil Rights Division is committed to vigorously pursuing prosecution. The public must be able to trust that no one, including those who wear a badge, is above the law. If that trust is broken, public confidence in the police force is undermined and an already difficult job is made more difficult for those on the force.

In Fiscal Year 2006, nearly 50 percent of the cases brought by the Criminal Section involved such prosecutions. From Fiscal Year 2001 through Fiscal Year 2006, we obtained convictions of nearly 50% more law enforcement officials for color of law violations than in the preceding six fiscal years. In *United States v. Walker and Ramsey*, for example, the Criminal Section successfully prosecuted two men for the politically-motivated assassination of the county sheriff-elect at the direction of the incumbent sheriff. In previous State trials, the sheriff had been convicted of murder and sentenced to life in prison, but the other defendants had been acquitted of murder charges. The Department stepped in and sought, successfully, convictions of two of the men, including a former deputy sheriff.

In *United States v. Marlowe*, a Federal jury convicted defendant Robert Marlowe, a former Wilson County Jail sergeant and night shift supervisor, of assaulting jail detainees. Marlowe participated in the beating of detainee Walter Kuntz and then failed to provide him with the necessary and appropriate medical care as he lay unconscious on the floor of the jail, resulting in his death. The jury also convicted Marlowe and defendant Tommy Conatser, a

former jailor who worked for Marlowe, of conspiracy to assault jail detainees. Marlowe and other officers bragged about the beatings and filed false and misleading reports to cover up the assaults. During the course of this prosecution, six other former Wilson County Correctional Officers pled guilty to felony charges relating to violations of the civil rights of inmates at the Wilson County Jail. This case was prosecuted in partnership with the U.S. Attorney's Office for the Middle District of Tennessee and the FBI. On July 6, 2006, defendant Marlowe was sentenced to life in prison. Other defendants received prison terms of up to 108 months in prison.

In addition to investigation and prosecution of color of law matters, Criminal Section staff conduct a significant amount of training and outreach. These efforts are designed to help law enforcement agencies prevent the occurrence of these violations. In Fiscal Year 2006, for example, we made presentations on the Criminal Section's civil rights enforcement program to local law enforcement officials attending the FBI's National Academy at Quantico, Virginia. We also made presentations to Federal officials such as the FBI and the Department of Homeland Security. Criminal Section staff also played a central role in designing and participating in a civil rights training program for Federal prosecutors at the Department's National Advocacy Center in Columbia, South Carolina.

As I noted earlier, I have tremendous respect for the men and women in police departments who risk their lives around the country each and every day to ensure that America is a safe place to live. To the extent that the Division can both assist further their mission and promote constitutional policing, we are performing a valuable task.

Hate Crimes

The Civil Rights Division is deeply committed to the vigorous enforcement of our nation's civil rights laws and, in recent years, has brought a number of high profile hate crime cases. We continue to aggressively prosecute those within our society who attack others because of the victims' race, color, national origin, or religious beliefs. During Fiscal Years 2006 and 2007, the Division has continued to bring to justice those who commit these terrible crimes. For example, in *United States v. Eye and Sandstrom*, the government is seeking the death penalty against defendants who allegedly shot and killed an African-American man because of his race. The government alleges that as the victim walked down the street, the defendants, whom he did not know, drove by and shot at him. Their shots missed the victim, so the defendants allegedly circled the neighborhood until they found him again. One of the defendants got out of the car, rushed up to the victim, and shot him in the chest, killing him. Trial is currently set for October 15, 2007.

Our other cases involve equally disturbing violations. In *United States v. Saldana*, four members of a violent Latino street gang were convicted of participating in a conspiracy aimed at threatening, assaulting, and even murdering African-Americans in a neighborhood claimed by the defendants' gang. All four defendants received life sentences. As a result of this prosecution, Criminal Section Deputy Chief Barbara Bernstein recently was selected to receive the coveted Helene and Joseph Sherwood Prize for Combating Hate by the Anti-Defamation League. The

ADL said that Deputy Chief Bernstein, as one of the select few in law enforcement to receive the prestigious award, "exemplifies an ongoing commitment, support, and contribution in helping to eliminate hate and prejudice." In *United States v. Coombs*, a man in Florida pled guilty to burning a cross in his yard to intimidate an African-American family that was considering buying the house next door to his residence.

In another hate crimes case, *United States v. Fredericy and Kuzlik*, two men pled guilty for their roles in pouring mercury, a highly toxic substance, on the front porch and driveway of a bi-racial couple in an attempt to force them out of their home. In April 2007, in *U.S. v. Walker*, we convicted three members of the National Alliance, a notorious white supremacist organization, with assaulting a Mexican-American bartender in Salt Lake City at his place of employment. These same defendants allegedly assaulted an individual of Native-American heritage outside another bar in Salt Lake City. Of particular note, the Anti-Defamation League praised the Division's efforts in successfully prosecuting this important hate crimes case.

And, as noted earlier, the Criminal Section is working closely with the FBI to identify unresolved civil rights era murders. Our commitment to this effort is illustrated in our track record of aggressively prosecuting civil rights era cases when we have been able to overcome jurisdictional and statute of limitations hurdles. As a result of these efforts, the Criminal Section, along with the United States Attorney's Office for the Southern District of Mississippi, last Thursday, June 14, 2007, secured the conviction of James Seale on two counts of kidnapping and one count of conspiracy for his role in the 1964 abduction and murder of Charles Moore and Henry Dee in Franklin County, Mississippi. And, in 2003, the Civil Rights Division successfully prosecuted Ernest Avants, a Mississippi Klansman who murdered an African-American man in 1966.

Human Trafficking

The prosecution of the despicable crime of human trafficking, a modern day form of slavery, continues to be a major element of our Criminal Section's work. The victims of human trafficking in the United States are often minority women and children, who are poor, are frequently unemployed or underemployed, and lack access to social safety nets. These victims have been exploited in the commercial sex industry or have been compelled into manual or domestic labor. The Attorney General's initiative on human trafficking has made the prosecution of these crimes a top priority. The Division continues to enhance our human trafficking prosecution program through vigorous prosecution of these cases, outreach to State and local law enforcement officers and non-governmental organizations who will find the victims of this terrible crime, and most recently through the creation of the Human Trafficking Prosecution Unit described above. Our work is complemented by the Criminal Division's Child Exploitation and Obscenity Section (CEOS), which is responsible for the prosecution of child sex trafficking and child sex tourism crimes in partnership with U.S. Attorney's offices around the country. Regarding child sex trafficking, the Department has initiated 87 cases since the beginning of this year as part of the Innocence Lost Initiative, which is a national effort to combat child prostitution conducted in partnership between CEOS, the FBI, and the National

Center for Missing and Exploited Children. Regarding child sex tourism, U.S. Immigration and Customs Enforcement has opened 124 investigations since the beginning of this year alone.

In Fiscal Year 2006, the Division continued to aggressively pursue those who commit human trafficking crimes, obtaining a record 98 convictions of human trafficking defendants. Working with the various United States Attorneys' Offices, we charged a record number of sex trafficking defendants (85) and 26 labor trafficking defendants. In addition to prosecuting the perpetrators of these horrible crimes, the Criminal Section also aids their victims. Under the 2000 Trafficking Victims Protection Act, 1166 trafficking victims from 75 countries have obtained eligibility for refugee-type benefits from HHS with the aid of the Civil Rights Division and other law enforcement agencies.

In Fiscal Year 2006, the Section obtained two of the longest sentences ever imposed in a sex trafficking case in *United States v. Carreto.* Defendants organized and operated a trafficking ring that smuggled Mexican women and girls into the United States and then forced them into prostitution in Queens and Brooklyn, New York. On April 27, 2006, two defendants were sentenced to 50 years in prison and a third defendant was sentenced to 25 years in prison for their crimes. On March 2, 2007, Consuelo Carreto-Valencia, the mother of the Carreto brothers who participated in their sex trafficking scheme, was arraigned in Federal court on a 27-count indictment charging her with multiple counts of sex trafficking and related crimes. She was extradited to the United States from Mexico in January 2007.

In *United States v. Arlan and Linda Kaufman*, the defendants, who operated a residential treatment facility for mentally ill adults, forced their severely ill residents to labor on the Kaufmans' farm and to participate as subjects in pornographic videos. The defendants committed fraud when they billed Medicare for this "treatment" they provided the victims. In November 2005, the defendants were convicted on all 35 counts of the indictment, including conspiracy, forced labor, involuntary servitude, and fraud. On January 23, 2006, Arlan Kaufman was sentenced to serve 30 years in prison and Linda Kaufman was sentenced to serve seven years.

In *United States v. Evelyn and Joseph Djoumessi*, the defendants held a young Cameroonian woman as an involuntary domestic servant for four and a half years. They smuggled the 14-year-old victim into the United States with the false promise of an American education and then held her in their home, forced her to work, beat her, and sexually assaulted her. In March 2006, the defendants were convicted of conspiracy and involuntary servitude. Evelyn Djoumessi was sentenced to 218 months and Joseph Djoumessi was sentenced to 60 months.

On May 26, 2006, in *United States v. Calimlim*, husband and wife Milwaukee medical doctors were convicted by a Federal jury for using threats of serious harm and physical restraint against a Filipino woman to coerce her labor as a domestic servant. The couple recruited and brought the victim from the Philippines to the U.S. in 1985 when she was 19 years old. For the next 19 years of her life, these defendants hid the victim in their home, forbade her from going outside, and told her that she would be arrested, imprisoned and deported if she were discovered.

On November 19, 2006, the defendants were sentenced to 4 years imprisonment, and on February 14, 2007, the Federal court awarded the victim over $900,000 in restitution.

In addition to our work in enforcement, the Criminal Section also actively reaches out to educate law enforcement agencies about human trafficking. For example, our human trafficking staff designed and launched a series of interactive human trafficking training sessions broadcast live on the Justice Television Network in which nearly 80% of the U.S. Attorneys' Offices participated. The Division is also supporting the 42 task forces funded by the Bureau of Justice Assistance and Office for Victims of Crime by providing training and technical assistance. We are supporting the President's Initiative Against Trafficking and Child Sex Tourism by performing assessments of anti-trafficking activities in targeted countries and making recommendations on program development.

Additionally, a national conference on human trafficking was held in October 2006 in New Orleans, Louisiana. Division staff played a central role in developing the program, moderated panels, gave speeches, and led interactive breakout sessions during the conference. Over six hundred practitioners from law enforcement, non-governmental organizations, and academia attended this very successful conference. At the conference, Attorney General Gonzales announced additional funding totaling nearly $8 million for law enforcement agencies and service organizations for the purpose of identifying and assisting victims of human trafficking and apprehending and prosecuting those engaged in trafficking offenses. The funding is being used to create new trafficking task forces in 10 cities around the country, bringing the total number of funded task forces to 42.

While we have made tremendous strides in the fight against human trafficking, there is still a great deal of work to be done. The Attorney General's initiative to eradicate this form of slavery will remain a top priority of the Division.

HOUSING AND CIVIL ENFORCEMENT

The Housing and Civil Enforcement Section is charged with ensuring non-discriminatory access to housing, credit, and public accommodations. We understand the importance of these opportunities to American families, and we have worked hard to meet this weighty responsibility. During Fiscal Years 2006 and 2007, the Division's Housing and Civil Enforcement Section has continued its strong commitment to enforcing the Fair Housing Act (FHA), the Equal Credit Opportunity Act (ECOA), Title II of the Civil Rights Act of 1964, and the land use provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA). In addition, in Fiscal Year 2006, the Section assumed enforcement jurisdiction over the Servicemembers Civil Relief Act (SCRA).

On February 15, 2006, the Attorney General launched Operation Home Sweet Home – a concentrated initiative to expose and eliminate housing discrimination in America. In announcing the program the Attorney General stated, "We will help open doors for people as they search for housing. We will not allow discrimination to serve as a deadbolt on the dream of

safe accommodations for their family." I am committed to making the Attorney General's pledge a reality, and the Civil Rights Division will continue to dedicate renewed energy, resources, and manpower to the testing program through investigations and visits designed to expose discriminatory practices. Under Operation Home Sweet Home, the Civil Rights Division conducted substantially more fair housing tests in Fiscal Year 2006 than in Fiscal Year 2005 and is testing at record-high levels in Fiscal Year 2007. In addition to increasing the number of tests, Operation Home Sweet Home also strives to conduct more focused testing by concentrating on areas to which Hurricane Katrina victims have relocated and on areas that, based on federal data, have experienced a significant volume of bias-related crimes.

Throughout this year, and in particular under Operation Home Sweet Home, the Division will continue to aggressively combat housing discrimination. The Division has expanded our outreach significantly by creating a new fair housing website (http://www.usdoj.gov/fairhousing), establishing a telephone tip line and a new e-mail address specifically to receive fair housing complaints, and sending outreach letters to over 400 public and private fair housing organizations. In Fiscal Year 2006, we filed two cases developed through our testing program that allege a pattern or practice of discrimination. We have filed one testing case so far in Fiscal Year 2007 and expect to see more in the future as a result of our enhanced testing program.

Race and national origin discrimination in housing clearly are continuing problems. Just a couple of months ago, we secured the second largest damage award ever obtained by the Department in a Fair Housing Act case against a former landlord in the Dayton, Ohio, area for discriminating against African Americans and families with children. The court ordered the defendant to pay a total of $535,000 in compensatory and punitive damages to 26 victims. Currently, we are litigating several other pattern or practice cases involving race and national origin discrimination.

We continue to enforce the anti-discrimination requirements of Title II. During Fiscal Year 2007, we resolved a Title II lawsuit against the owner and operator of Eve, a Milwaukee nightclub. We alleged that the nightclub discriminated against African-American patrons by denying them admission for false reasons, such as that the nightclub was too full or that it was being reserved for a private party. Our settlement agreement requires the nightclub to implement changes to its policies and practices in order to prevent such discrimination. We also continue to monitor compliance with our 2004 consent decree in *United States v. Cracker Barrel Old Country Stores* as the company makes progress toward compliance with the comprehensive reforms mandated by that consent decree.

Notably during Fiscal Year 2006, the Civil Rights Division filed more sexual harassment cases than in any year in its history. We continue to bring these cases, with the most recent being filed in February against a landlord in Ohio. Sexual harassment by a landlord is particularly disturbing because the perpetrator holds both the lease and a key to the apartment. For example, one suit alleges that the owner of numerous rental properties in Minnesota has subjected female tenants to severe and pervasive sexual harassment, including making unwelcome sexual advances; touching female tenants without their consent; entering the

apartments of female tenants without permission or notice; and threatening to or taking steps to evict female tenants when they refused or objected to his sexual advances. In another case, the Housing and Civil Enforcement Section obtained a consent decree requiring the defendants, who were the property managers, owner, and a maintenance man, to pay $352,500 in damages to 20 identified aggrieved persons, as well as a $35,000 civil penalty.

Although most sexual harassment cases are filed under the Fair Housing Act, in Fiscal Year 2006 the Division filed its first-ever sexual harassment case under the Equal Credit Opportunity Act. The complaint alleges that a former vice president of the First National Bank of Pontotoc in Pontotoc, Mississippi, used his position to sexually harass female borrowers and applicants for credit. This case is currently in litigation.

Our lawsuits also protect the rights of Americans to purchase houses as well as rent them. Our fair lending enforcement efforts are another component of our fight against housing discrimination. While a lender may legitimately consider a range of factors in determining whether to provide a candidate a loan, race has no place in this determination. "Redlining" is the term used to describe a lender's refusal to give loans in certain areas based on the racial makeup of the area's residents. The Division is working hard to eliminate this form of discrimination, which places a barrier between Americans and the dream of owning their own home.

We recently filed and resolved a lawsuit against Centier Bank in Indiana, alleging violations of the Equal Credit Opportunity Act and the Fair Housing Act. In this case, we alleged Centier unlawfully refused to provide its lending products and services on an equal basis to residents of minority neighborhoods, thereby denying hundreds of loans to prospective African-American and Hispanic residents. Under the settlement agreement, the bank will open new offices and expand existing operations in the previously excluded areas, as well as invest $3.5 million in a special financing program and spend at least $875,000 on outreach, marketing, and consumer financial education in these previously excluded areas.

Also in Fiscal Year 2007, we filed and resolved a case against Compass Bank of Alabama for violating the Equal Credit Opportunity Act by engaging in a pattern of discrimination on the basis of marital status in thousands of automobile loans it made through hundreds of different car dealerships in the South and Southwest. Specifically, we alleged that the bank charged non-spousal co-applicants higher interest rates than similarly-situated married co-applicants. Under the consent decree, the bank will pay up to $1.75 million to compensate several thousand non-spousal co-applicants whom we alleged were charged higher rates as a result of their marital status.

A vital element of the President's New Freedom Initiative is the Division's enforcement of the accessibility provisions of the FHA. The FHA requires that multi-family housing constructed after 1991 include certain provisions to make it usable by people with disabilities. In 2005, we launched our Multi-Family Housing Access Forum, intended to assist developers, architects, and others understand the FHA's accessibility requirements and to promote a dialogue between the developers of multi-family housing and persons with disabilities and their advocates. Our most recent Access Forum event, held in Minneapolis on May 22, 2007,

attracted over 100 persons, and we will hold another Access Forum in November at a location to be announced this summer.

In addition to these proactive outreach efforts, the Division continues to actively litigate cases involving housing that is not designed and constructed in accordance with the Fair Housing Act and the Americans with Disabilities Act. We resolved five cases in Fiscal Year 2006 through consent decrees and have resolved five cases already in Fiscal Year 2007. We also filed three new design and construction cases in Fiscal Year 2006, which are currently in litigation. Our litigation in this area continues to be very successful. In April 2007, we obtained favorable summary judgment rulings from the courts in two of these cases – rejecting legal arguments made by the defendants and finding key defendants in each case liable for violations of the FHA – without even having to go to trial.

In the first half of Fiscal Year 2007, we also settled two group home cases against municipalities. Our settlement with the City of Saraland, Alabama, requires the city to allow a foster-care home for adults with mental disabilities to operate in a single-family residential zone. The city also must pay $65,000 in damages and fees to the complainants and a $7,000 civil penalty to the United States. Our settlement with the Village of South Elgin, Illinois, requires the village to grant a permit for up to seven residents to a "sober home" providing a supportive environment for recovering alcoholics and drug users; to pay $25,000 in monetary damages to the owner of the home; to pay $7,500 to each of two residents who were forced to leave the home; and to pay a $15,000 civil penalty.

We also have begun our efforts to enforce the SCRA. We have recently opened our first investigations and have several matters under review.

DISABILITY RIGHTS

Since the January 2001 announcement of the President's New Freedom Initiative, the Division's Disability Rights Section has achieved results for people with disabilities in over 2,000 actions under the Americans with Disabilities Act of 1990 (ADA), including formal settlement agreements, informal resolution of complaints, successful mediations, consent decrees, and favorable court decisions. In Fiscal Year 2006 alone, the Division achieved favorable results for persons with disabilities in 305 cases and matters, which provided injunctive relief and compensatory damages for people with disabilities across the country and set major ADA precedents in a number of important areas. The Division also continued its important work under Project Civic Access. Many Americans with disabilities are able to enjoy life in a much fuller capacity as a result of our enforcement activities, and the Division will continue to make our efforts in this area a priority.

Our work under the ADA during my tenure as Assistant Attorney General involved cases across the country and in a variety of settings, including hospitals, public transportation, restaurants, movie theaters, college campuses, and retail stores.

An example of our work in a hospital setting is an agreement we reached with Laurel Regional Hospital in Maryland on behalf of persons with speech or hearing impairments. The hospital agreed to assess the communication needs of individuals with speech or hearing disabilities and provide qualified interpreters (on-site or video interpreting) as soon as possible when necessary for effective communication.

In the area of public transportation, the City of Detroit agreed to take steps to ensure that public bus wheelchair lifts are operable and in good repair and to provide alternate transportation promptly when there are breakdowns in accessible bus service.

The Division also has entered into agreements with major movie theater companies to make the experience of going to the movies more accessible to all Americans. Two of the largest movie theater chains in the country, Cinemark USA, Inc. and the Regal Entertainment Group, agreed to dramatically improve the movie going experience for persons who use wheelchairs and their companions at stadium-style movie theaters across the United States. Both chains have agreed that all future construction at both theater chains will be designed in accordance with plans approved by the Department and barriers will be removed at certain existing theaters.

Project Civic Access (PCA) is a wide-ranging initiative to ensure that towns and cities across America comply with the ADA. The goal of Project Civic Access is to ensure that people with disabilities have an equal opportunity to participate in civic life. To date, we have reached 153 agreements with 143 communities to make public programs and facilities accessible. Each of these communities has agreed to take specific steps, depending on local circumstances, to make core government functions more accessible to people with disabilities. These agreements quite literally open civic life up to participation by individuals with all sorts of disabilities. The agreements have improved access to many aspects of civic life, including courthouses, libraries, parks, sidewalks, and other facilities, and address a wide range of accessibility issues, such as employment, voting, law enforcement activities, domestic violence shelters, and emergency preparedness and response. During the past 6 years, we have obtained more than 80% of the agreements reached under Project Civic Access since it began in 1999, improving the lives of more than 3 million Americans with disabilities.

On December 5, 2006, the Division entered its 150th Project Civic Access agreement with Kanawha County, a region of West Virginia where almost 22% of the population has disabilities. Under this agreement, the county will ensure access for people with disabilities to county programs and facilities, including administrative buildings, courts, emergency management programs and facilities, law enforcement programs and facilities, the website, and polling places. The agreement was signed at a ceremony along with two other agreements: the first, an agreement with Kanawha County Parks and Recreation, ensuring access for people with disabilities to the county's parks and recreation programs, services, activities, and facilities, and the second, an agreement with Metro 9-1-1 of Kanawha County, ensuring access to 9-1-1 emergency communication services for people in the county and the City of Charleston who are deaf, are hard-of-hearing, or have speech impairments. Since then, the Division has entered into three additional agreements with Hernando, Mississippi; the Pike County, Kentucky, Health Department; and the Pike County, Kentucky, Library District.

We have expanded our PCA focus to include emergency preparedness for people with disabilities. Our activities related to recovery from the hurricanes in the Gulf region in 2005 have included reviewing draft specifications and sample floor plans for accessible travel trailers and mobile homes. We also provided guidance to FEMA on constructing accessible ramps, trained FEMA's equal rights staff on best practices in addressing the emergency-related needs of people with disabilities, and began working with certain local governments to ensure that their emergency management plans appropriately address the needs of individuals with disabilities. Under Executive Order 13347, Individuals with Disabilities in Emergency Preparedness, the Division is collaborating with the Department of Homeland Security's Office for Civil Rights and Civil Liberties in its emergency management activities.

In October 2006, the Attorney General directed the Civil Rights Division to use the knowledge and experience the Division has gained in its work with State and local governments under Project Civic Access to begin a technical assistance initiative. As a result, the Division is publishing the "ADA Best Practices Tool Kit for State and Local Governments," a document to help State and local governments improve their compliance with ADA requirements. This Tool Kit is being released in several installments. In the Tool Kit, the Division will provide commonsense explanations of how the requirements of Title II of the ADA apply to State and local government programs, services, activities, and facilities. The Tool Kit will include checklists that State and local officials can use to conduct assessments of their own agencies to determine if their programs, services, activities, and facilities are in compliance with key ADA requirements.

The first installment, released on December 5, 2006, covered "ADA Basics: Statute and Regulations" and "ADA Coordinator, Notice and Grievance Procedure: Administrative Requirements Under Title II of the ADA." The second installment, issued on February 27, 2007, covered "General Effective Communication Requirements Under Title II of the ADA" and "9-1-1 and Emergency Communications Services." The third installment, issued on May 7, 2007, covered "Website Accessibility Under Title II of the ADA" and "Curb Ramps and Pedestrian Crossings." These installments, and all subsequent installments, will be available on the Department's ADA Website (www.ada.gov). State and local officials are not required to use these technical assistance materials, but they are strongly encouraged to do so. The Tool Kit checklists will help them to identify the types of ADA noncompliance that the Civil Rights Division has commonly identified during Project Civic Access compliance reviews as well as the specific steps that State and local officials can take to resolve these common compliance problems.

The Division continues to have great success with the Disability Rights Section's innovative ADA Mediation Program. Using more than 400 professional ADA-trained mediators throughout the United States, the ADA Mediation Program continues to expand the reach of the ADA at minimum expense to the government. It allows the Section quickly to respond to and resolve ADA complaints effectively, efficiently, and voluntarily, resulting in the elimination of barriers for people with disabilities throughout the United States. Since FY 1998, more than 2,800 complaints filed with the Department alleging violations of Title II and Title III have been

referred to the program. Of the more than 2,100 mediations completed, 78% have been successful. Last fiscal year's success rate climbed to 82%, our highest ever.

The Division promotes voluntary compliance with the ADA through a wide range of technical assistance and outreach efforts. I have personally attended meetings of our ADA Business Connection, a multifaceted initiative for businesses started by the Department in 2002. This initiative includes conducting a series of meetings between disability and business communities around the country and producing publications on topics related to the ADA that are of particular interest to small businesses. In Fiscal Year 2006, a series of dynamic ADA Business Connection Leadership meetings were held in four cities with more than 150 participants from small and mid-sized businesses, large corporations, and organizations of people with disabilities.

In addition to the Business Connection meetings, we also operate an ADA Information Line as well as an informative website. Our ADA Information Line receives over 100,000 calls annually from people seeking to discuss specific issues with ADA Specialists or order technical assistance publications through the automated system. In Fiscal Year 2006, over 46,000 calls to the ADA Information Line were answered by ADA Specialists. Also, the Section's popular ADA Website, www.ada.gov, continues to be active. In Fiscal Year 2006, it served more than 3.1 million visitors who viewed the pages and images more than 49 million times, an increase in hits of over 30% over the prior year.

In addition to these outreach efforts, in Fiscal Year 2006, the Disability Rights Section sent a mailing to 25,000 State and local law enforcement agencies offering free ADA publications and videotapes developed specifically for law enforcement audiences. We also issued a revised and expanded guide for local governments on making emergency preparedness and response accessible for people with disabilities. Additionally, the Section participated in more than 70 speaking and outreach events in Fiscal Year 2006.

The Disability Rights Section publishes regulations to implement Title II and Title III of the ADA and serves as the Attorney General's liaison to the U.S. Architectural and Transportation Barriers Compliance Board (Access Board). During 2006 and 2007, the Section continued to develop revised ADA regulations that will adopt updated design standards consistent with the revised ADA Accessibility Guidelines published by the Access Board in July 2004. The revised guidelines are the result of a multi-year effort to promote consistency among the many Federal and State accessibility requirements. We are now drafting a proposed rule and developing the required regulatory impact analysis.

SPECIAL LITIGATION

The Division's Special Litigation Section has two core missions: protecting the civil rights of institutionalized persons and promoting constitutional law enforcement.

The Civil Rights of Institutionalized Persons Act (CRIPA) authorizes the Attorney General to investigate patterns or practices of violations of the federally protected rights of individuals in State-owned or -operated institutions. These include nursing homes, facilities for those with mental illness and developmental disabilities, prisons, jails, and juvenile justice facilities. Our investigations focus on a myriad of issues, including abuse, medical and mental health care, fire safety, security, adequacy of treatment, and training and education for juveniles.

In Fiscal Year 2006 alone, the Civil Rights Division conducted over 123 investigatory and compliance tours. Thus far in Fiscal Year 2007, the Division has conducted over 80 investigatory and compliance tours, and is handling CRIPA matters and cases involving over 192 facilities in 34 States, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of Guam and the Virgin Islands. The Division also continues its investigations of 92 facilities and monitoring the implementation of consent decrees, settlement agreements, memoranda of understanding, and court orders involving 100 facilities. Finally, in Fiscal Year 2007, the Division has opened ten investigations of 35 facilities, obtained five settlement agreements, and issued eight findings letters.

Since January 20, 2001, this Administration has authorized 74 CRIPA investigations, as compared to the 70 investigations opened during the preceding six-year period. With regard to juvenile justice facilities, this Administration has increased the number of settlement agreements by more than 60%, has more than doubled the number of investigations (21 vs. 9), and has more than doubled the number of findings letters (17 vs. 6) issued. One recent example of the Division's work regarding juvenile justice facilities is the successful resolution of the Division's investigation of conditions at the Baltimore City Juvenile Justice Center, a juvenile detention facility in Baltimore, Maryland, operated by the State of Maryland. In August 2006, the Division reported its investigative findings to the State, identifying constitutional deficiencies such as the failure to adequately protect juveniles from violence, inadequate mental health care, and deficient special education services. Last month, the Division reached a court-filed settlement with the State requiring it to remedy the identified deficiencies. This settlement was incorporated into the Division's pre-existing settlement involving two other Maryland juvenile facilities.

Another example of the Division's juvenile justice work includes its ongoing efforts to ensure that conditions of confinement at the Oakley and Columbia Training Schools, operated by the State of Mississippi, comply with Federal law. The Division filed suit in December 2003 following an investigation that uncovered shockingly abusive practices, including hogtying, pole-shackling, and placing suicidal youth for extended periods of time in a "dark room," naked. In June 2005, the case settled through a consent decree requiring the State to adopt measures designed to protect juveniles from harm and to provide guidelines for use of force, and a separate agreement regarding mental health care and special education services. Since the settlement, we have repeatedly visited these facilities to assess the State's compliance and continue vigorously to enforce the agreements to ensure that youth are protected from harm and that mandated reforms are timely implemented.

The Division's important health care work is illustrated by a court-enforceable settlement agreement reached last month with the State of New Mexico regarding conditions of resident care and treatment at the Ft. Bayard Medical Center, a state-owned nursing home in Ft. Bayard, New Mexico. This nursing home serves approximately 150 residents and maintains a unit dedicated to veterans. The agreement followed an investigation, which the Division commenced in April 2005, that found numerous life-threatening conditions. The agreement requires improvements in several areas, including care planning, medication practices, protection from harm, environmental conditions, and ensuring that residents are served in the most integrated setting appropriate to their needs. The Division will monitor the agreement's implementation through site visits and other mechanisms.

Another example is an historic settlement with California involving four State mental health care facilities that provide inpatient psychiatric care to nearly 5,000 people committed civilly or in connection with criminal proceedings. The Division's investigation, which commenced in March 2002, initially involved one facility but ultimately expanded to include three others. Among other violations, we found a pattern and practice of preventable suicides and serious, life-threatening assaults by staff and other patients. In two instances, patients were murdered by other patients. The extensive reforms required by the consent decree, which was filed in court last summer, mandate that individuals in the hospitals are adequately protected from harm, are provided adequate services to support their recovery and mental health, and are served in the most integrated setting appropriate for their needs, consistent with the terms of any court-ordered confinement. To date, the State has been cooperative with the Division's efforts to implement the comprehensive settlements.

In Fiscal Year 2006, the Division aggressively pursued contempt actions against several recalcitrant jurisdictions to address their long-term failure to achieve compliance with agreed-upon settlement remedies. For example, in *United States v. Virgin Islands*, our inspections of an adult detention center revealed unsupervised housing units, inadequate medical and mental health care, and deplorable environmental conditions. As a result, the court granted the Division's motion to find the Virgin Islands in contempt of the court's previous orders and our consent decree addressing conditions at the detention center. Specifically, the court ordered the appointment of a special master to address ongoing violations of the constitutional rights of persons incarcerated at the facility. Although violence at the facility has been an ongoing issue, we have been working closely with the Special Master and the jurisdiction to address the long-term systemic failures at the facility.

Also illustrative is a contempt action that the Division filed in May 2006 against the District of Columbia, in *Evans and United States v. Fenty*, a case about community services for persons with developmental disabilities discharged from the District's now-closed Forest Haven Center. In March 2007, the court found that the District was not in compliance with several court orders and ordered the parties to negotiate relief with two Special Masters.

In addition to its CRIPA work, the Special Litigation Section investigates patterns or practices of violations of Federally protected rights by law enforcement agencies under Section 14141 of the 1994 Violent Crime Control and Law Enforcement Act.

The Division has ensured the integrity of law enforcement by more than tripling the number of settlements negotiated with police departments across the country from 2001 to 2006. During this timeframe, the Administration has successfully resolved fourteen pattern or practice police misconduct investigations involving eleven law enforcement agencies, compared to only four investigations resolved by settlement during a comparable time period of the previous Administration. From 2001 to 2006, the Division filed more consent decrees (4 vs. 3) than in the preceding 6 years. We have issued, moreover, more than six times the numbers of technical assistance letters to police departments (19 vs. 3).

Additionally, during the current fiscal year, the Division is focusing its resources on vigorously monitoring the enforcement of its eight existing settlement agreements to ensure timely compliance with the terms of those agreements. Similarly, the Division continues to place a great deal of emphasis on providing on-going technical assistance to law enforcement agencies regarding best practices and how to conform their policies and practices to constitutional standards.

EMPLOYMENT DISCRIMINATION

The Civil Rights Division remains diligent in combating employment discrimination, one of the Division's most long-standing obligations. Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those claims are investigated and potentially litigated by the Equal Employment Opportunity Commission (EEOC). However, the Civil Rights Division's Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers.

Pursuant to Section 707 of Title VII, the Attorney General has authority to bring suit against a State or local government employer where there is reason to believe that a "pattern or practice" of discrimination exists. These cases are factually and legally complex, as well as time-consuming and resource-intensive.

One recent case highlights our efforts. In *United States v. City of New York*, filed on May 21, 2007, the Division alleged that since 1999, the City of New York has engaged in a pattern or practice of discrimination against black and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York in violation of Title VII. Specifically, the complaint alleges that the City's use of two written examinations as pass/fail screening devices and the City's rank-order processing of applicants from its firefighter eligibility lists based on applicants' scores on the written examinations (in combination with scores on a physical performance test) have resulted in a disparate impact against black and Hispanic applicants and are not job-related and consistent with business necessity. The complaint was filed pursuant to Sections 706 and 707 of Title VII, and was expanded to include discrimination against Hispanics as a result of the Division's investigation.

In Fiscal Year 2006, we filed three complaints alleging a pattern or practice of employment discrimination. In *United States v. City of Virginia Beach* and *United States v. City of Chesapeake*, the Division alleged that the cities had violated Section 707 by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. In *Virginia Beach*, the parties reached a consent decree providing that the city will use the test as one component of its written examination and not as a separate pass/fail screening mechanism with its own cutoff score. On June 15, 2007, the court provisionally entered a consent decree in the City of Chesapeake litigation.

In *United States v. Southern Illinois University*, the Division challenged under Title VII three paid graduate fellowship programs that were open only to students who were either of a specified race or national origin or who were female. While denying that it violated Title VII, the University admitted that it limited eligibility for and participation in the paid fellowship programs on the basis of race and sex. The case was resolved by a consent decree approved by the court on February 9, 2006.

In Fiscal Year 2006, the Employment Litigation Section obtained settlement agreements or consent decrees in six cases alleging a pattern or practice of discrimination. One example is a pattern or practice case the Division brought against the State of Ohio and the Ohio Environmental Protection Agency. We reached a consent decree on September 5, 2006, that accommodated employees with religious objections to supporting the public employees' union. The consent decree permits objecting employees to direct their union fees to charity.

The Division also has enforcement responsibility for the Uniformed Service Employment and Reemployment Rights Act of 1994 (USERRA). USERRA was enacted to protect veterans of the armed services when they seek to resume the job they left to serve their country. USERRA enables those who serve their country to return to their civilian positions with the seniority, status, rate of pay, health benefits, and pension benefits they would have received if they had worked continuously for their employer. In Fiscal Year 2006, the Division filed four USERRA complaints in Federal district court and resolved six cases.

During Fiscal Year 2006, we filed the first USERRA class action complaint ever filed by the United States. The original class action complaint, which was filed on behalf of the individual plaintiffs we represent, charges that American Airlines (AA) violated USERRA by denying three pilots and a putative class of other pilots employment benefits during their military service. Specifically, the complaint alleges that AA conducted an audit of the leave taken for military service by AA pilots in 2001 and, based on the results of the audit, reduced the employment benefits of its pilots who had taken military leave, while not reducing the same benefits of its pilots who had taken similar types of non-military leave. Other examples of recent USERRA suits include *Richard White v. S.O.G. Specialty Knives*, in which a reservist's employer terminated him on the very day that the reservist gave notice of being called to active duty. We resolved this case through a consent decree that resulted in a monetary payment to the reservist. In *McCullough v. City of Independence, Missouri*, the Division filed suit on behalf of

Wesley McCullough, whose employer allegedly disciplined him for failing to submit "written" orders to obtain military leave. We entered into a consent decree in which the employer agreed to rescind the discipline and provide Mr. McCullough payment for the time he was suspended. The employer also agreed to amend its policies to allow for verbal notice of military service.

In Fiscal Year 2007 thus far, we have filed 4 USERRA complaints in district court and resolved 5 cases. Additionally, the United States Attorney's offices have resolved three cases this fiscal year. One of these cases we have resolved in the current fiscal year is *McKeage v. Town of Stewartstown, NH*. In that case, the town sent Staff Sergeant Brendon McKeage a letter while he was on active duty in Iraq telling him he no longer had his job with the town. McKeage had been employed as the Chief of Police for the Town of Stewartstown. When the citizens of Stewartstown learned that their Chief of Police had been terminated while serving his country, they voted to censure the Town for its "outrageous and illegal" conduct. Despite this public censure, the Town still refused to reemploy SSG McKeage in his former position. Once we notified Stewartstown that we intended to sue, the employer decided to settle the case. The settlement terms include a payment to SSG McKeage of $25,000 in back wages.

The Division has proactively sought to provide information to members of the military about their rights under USERRA and other laws. We recently launched a website for service members (www.servicemembers.gov) explaining their rights under USERRA, the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), and the Servicemembers' Civil Relief Act (SCRA).

EQUAL EDUCATIONAL OPPORTUNITIES

The Division continues its important work of ensuring that equal educational opportunities are available on a non-discriminatory basis. The Division currently has hundreds of open desegregation matters, some of which are many decades old. The majority of these cases had been inactive for years, yet each represents an unfulfilled mandate to root out the vestiges of de jure segregation to the extent practicable and to return control of constitutionally compliant public school systems to responsible local officials.

To ensure that districts comply with their obligations, the Division actively reviews open desegregation cases to monitor issues such as student assignment, faculty assignment and hiring, transportation policies, extracurricular activities, the availability of equitable facilities, and the distribution of resources. In Fiscal Year 2006, the Educational Opportunities Section initiated 38 new case reviews to determine whether districts have met their desegregation obligations, our second highest total to date for any fiscal year. So far, in Fiscal Year 2007, the Section has initiated 37 new case reviews. For those districts that have achieved unitary status, we join in the school districts' motions to dismiss the case. For those districts that have not met their obligations, the Section works with the district to put it on the path to unitary status. In Fiscal Year 2006, we identified 14 cases in which additional relief was needed; to date, in Fiscal Year 2007, 12 cases were identified.

Based upon these efforts, in Fiscal Year 2006, the Division resolved *United States v. Covington County, Mississippi*. This is a district that operated under desegregation orders entered by a court in 1970 and 1975. The case review process revealed that although the majority of students district wide are African American, the largest school maintained in the district was nearly all white. The consent decree desegregated the schools, which resulted in reduced transportation times for many students and provided enrichment programs for one school that could not be easily desegregated.

We also are actively seeking relief in districts such as McComb, Mississippi, where we are opposing segregated classroom assignments. The Division worked to address other issues in education during Fiscal Year 2006, including inter-district student transfers. In Alabama, the Division entered into a statewide consent decree which addresses desegregation with respect to the construction of school facilities.

In Fiscal Year 2007, we filed a successful motion for summary judgment in West Carroll Parish, Louisiana. The court determined that the school board had failed to eliminate vestiges of discrimination in school assignments and required further student desegregation relief.

The Educational Opportunities Section also is achieving results for persons with disabilities in the education setting. In Fiscal Year 2006, the Section successfully defended the Department of Education's regulation interpreting the "stay put" provision of the Individuals with Disabilities Education Act in a case involving the Commonwealth of Virginia and a local school district. The Section also successfully defended the Equal Educational Opportunities Act of 1974's provision regarding the obligation to take action to overcome language barriers for English Language Learners from an attack by the State of Texas, which alleged that Congress did not properly abrogate the State's immunity from suit. In Fiscal Year 2007, we have continued our work in this area by opening several new investigations. The Section also continued its work in investigating allegations of religious discrimination.

PROTECTING CIVIL RIGHTS AT THE APPELLATE LEVEL

During my tenure as Assistant Attorney General, the Division's Appellate Section has been very productive. From November 9, 2005, to June 12, 2007, the Appellate Section filed 167 briefs and substantive papers in the United States Supreme Court, the courts of appeals, and the district courts. Ninety-three of these filings were appellate briefs for the Office of Immigration Litigation (OIL). Excluding OIL decisions, 88% of the decisions reaching the merits were in full or substantial accord with the Division's contentions. The courts of appeals rendered 40 merits decisions, 90% of which were in full or substantial accord with the Division's contentions. The district courts rendered six decisions in cases briefed by the Appellate Section, four of which were in full or substantial accord with the Division's contentions. During this period, the Division filed 22 amicus briefs, bringing the total number of amicus briefs filed during this Administration to 98. I would like to highlight two cases that the Appellate Section has handled during my tenure as Assistant Attorney General.

In the United States Court of Appeals for Fifth Circuit, the Appellate Section filed a brief defending the conviction the Division obtained in *United States v. Simmons*. While on duty as a police officer, the defendant took a 19-year-old woman into custody, drove her to a remote wooded area in the middle of the night, and raped her as another police officer served as a lookout. He was acquitted of sexual battery and conspiracy charges in State court. After the State court verdict, the Division conducted its own investigation and located a number of witnesses who had not testified at the State trial. The defendant was then indicted by a Federal grand jury for sexual assault while acting under color of law, in violation of 18 U.S.C. § 242. He was convicted of this charge, with the jury finding that the offense involved aggravated sexual abuse resulting in bodily injury to the victim. The district court sentenced him to 20 years in prison. The defendant appealed his conviction, and the United States cross-appealed his sentence. The Fifth Circuit issued a decision affirming the defendant's conviction, vacating his sentence, and remanding for resentencing.

In *United States v. Lee*, the Appellate Section successfully argued in the United States Court of Appeals for the Ninth Circuit in support of the conviction and sentence obtained by the Division. The defendant, who owned and operated a garment factory in American Samoa, recruited workers from Vietnam, China, and American Samoa. Once the workers arrived at his factory, the defendant abused them in various ways, including imprisonment, starvation, and threats of deportation. The defendant was convicted of extortion, money laundering, conspiracy to violate civil rights, and holding workers to a condition of involuntary servitude. He was sentenced to 40 years' imprisonment. In affirming the defendant's convictions and sentence, the Ninth Circuit held, among other things, that a person arrested in American Samoa for allegedly committing crimes in America Samoa may properly be tried and convicted in the United States District Court for the District of Hawaii.

PROTECTION OF IMMIGRANTS' EMPLOYMENT RIGHTS

From our country's inception, we have been a nation built by immigrants who have continually come to America seeking new and better opportunities. This is still the case today, as new and recent immigrants make up a significant portion of the labor pool. Yet often, individuals who are work-authorized immigrants, naturalized U.S. citizens, or native-born U.S. citizens face workplace discrimination because they might look or sound "foreign."

This is where the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) takes action. OSC enforces the anti-discrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986 (IRCA), which protects lawful workers from intentional employment discrimination based upon citizenship, immigration status, or national origin, unfair documentary practices relating to the employment eligibility verification process, and retaliation.

OSC accomplishes its mission to protect lawful workers from discrimination through both enforcement and outreach. Our enforcement efforts include investigations of charges, settlements and resolutions, informal telephone interventions, and litigation. OSC pursues both

individual violations and patterns or practices of discrimination. A few examples of these actions include unlawful citizen-only hiring policies; preferences for undocumented workers; and refusal to employ lawful workers because employers did not follow proper employment eligibility verification procedures. The victims in these cases include native-born U.S. citizens, naturalized U.S. citizens, lawful permanent residents, asylees, refugees, and other work-authorized immigrants from around the world. The employers in these cases include some of the nation's largest companies as well as smaller businesses.

In Fiscal Year 2006, OSC settled 72 charges through either formal settlement agreements or letters of resolution and has settled 75 charges thus far in Fiscal Year 2007. For example, in *Luis A. Lopez v. GALA Construction, Inc.*, a lawful permanent resident from Mexico was refused hire because a construction company rejected his unrestricted Social Security card and Resident Alien card for employment eligibility verification. OSC settled the charge. As a result, the charging party received over $11,000 in back pay and front pay, and the company agreed to train its managers in proper employment eligibility verification procedures and non-discriminatory hiring practices. In addition, over the past year, OSC has investigated 85 charges of citizenship status discrimination filed by the Programmers Guild, a professional society that advances the interests of computer programmers. The Programmers Guild filed charges against software and information technology (IT) companies that placed internet ads stating an explicit hiring preference for temporary visa holders, such as H-1B visa holders, over U.S. citizens and other authorized workers. OSC has resolved 49 of these charges (inclusive of the 75 settled charges noted above). Consequently, IT companies across the nation have agreed to end hiring preferences for temporary visa holders over other U.S. workers and will no longer post discriminatory job advertisements. They also have agreed to post equal employment opportunity notices on their websites.

Informal interventions are another species of enforcement activity. Through its hotlines, OSC often is able to bring early, cost-effective resolutions to employment disputes that might otherwise result in the filing of charges and litigation expenses. In Fiscal Year 2006, OSC successfully completed 189 telephone interventions and has completed 124 telephone interventions thus far in Fiscal Year 2007.

OSC also engages in educational and outreach activities to workers, employers, the bar, unions, legal services, and advocacy organizations to deter potential immigration-related employment discrimination. Our outreach program is multi-faceted and includes employer and worker toll-free hotlines, public service announcements, outreach and training materials designed to reach both English speakers and those with limited English proficiency, presentations, a website, and a periodic newsletter. OSC distributed approximately 65,400 individual pieces of educational materials in FY 2006, 39 percent of which were in Spanish. Thus far in Fiscal Year 2007, OSC has distributed approximately 65,750 educational materials. Over the past eighteen months, its public service announcements have aired nearly 21,000 times on television and radio in English and Spanish, reaching an estimated audience of approximately 76 million. Thus far in Fiscal Year 2007, over 650 television public service announcements have been aired, reaching an estimated audience of more than 6 million English- and Spanish-speaking viewers. OSC also administers a grant program that awards funds to organizations for the purpose of conducting

public education programs under the anti-discrimination provisions of the Immigration and Nationality Act. OSC's grantees have included State and local fair employment practices agencies, business organizations, and non-profit and faith-based immigrant service organizations. This year's grants include, among other things, coordination of legal and social services for immigrant communities in the post-Katrina Gulf Coast region.

LIMITED ENGLISH PROFICIENCY

In addition to the Division's major efforts for those who are limited-English proficient in the areas of voting and education, we also are making strides on behalf of those who need language assistance in other areas. This Administration has made a priority of ensuring implementation and enforcement of civil rights laws affecting persons with limited English proficiency (LEP). The Division's Coordination and Review Section plays a central role in this effort, and during my tenure as Assistant Attorney General, it has continued its work to ensure that LEP individuals are able to effectively participate in or benefit from Federally assisted and Federally conducted programs and activities.

The Division works on behalf of LEP individuals in its role in implementing Executive Order 13166 and Title VI of the Civil Rights Act of 1964. The Division's Coordination and Review Section works to provide information and coordinate activities to ensure that Federal agencies are providing meaningful access to LEP persons in its Federally conducted programs and that recipients of Federal funds are providing meaningful access in their programs and activities. Executive Order 13166 requires that all Federal funding agencies use the Department's LEP Recipient Guidance Document, published on June 13, 2002, as a model in drafting and publishing guidance documents for their recipients, following approval by the Department.

In Fiscal Year 2006, the Coordination and Review Section continued its outreach and interagency efforts designed to provide information on the needs of persons who are limited English proficient. Among other things, these efforts included completing the development and release of the interagency video entitled "Breaking Down the Language Barrier: Translating Limited English Proficiency Policy into Practice" in English, Spanish, and Vietnamese, and subtitled in Chinese and Korean. The Section also issued a new brochure for Federal agencies and the agencies' recipients explaining the requirements and steps to ensure that LEP individuals have meaningful access to programs and services. The Division developed a survey form, which it distributed to all of the more than 80 Federal agencies about efforts to ensure access to LEP individuals in their own programs, and I personally sent a memorandum to all agencies asking that they respond to the survey form. Many did, and our Coordination and Review Section is analyzing the results and is working on a report that will outline promising practices of Federal agencies. I was the featured presenter at the fourth anniversary meeting of the Federal Interagency Working Group on LEP on February 2, 2006, a meeting that was attended by almost 150 people from 40 different Federal agencies. The Section is also responsible for maintaining LEP.gov, a website clearinghouse of guidance, model plans, links, tools, and other resources on the LEP initiative.

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Another area of focus by the Coordination and Review Section during my tenure as Assistant Attorney General has been emergency preparedness. The Division continues to work with agencies to assist them in ensuring that the needs of national origin minorities (including LEP individuals) are effectively included in emergency preparedness activities and planning. As part of this effort, the Section recently began participating in activities of the Department of Homeland Security's Special Needs Work Group, which is providing comments on the National Response Plan. The Division also has begun work on creating a LEP emergency tool that can be used by responders in emergencies. In addition, I gave the keynote speech at the December 6, 2006, meeting of the Federal Interagency Working Group on LEP, a meeting entitled "The Importance of Language Access in Emergency Preparedness."

Probably the most significant event related to LEP access occurred on March 15-16. The Coordination and Review Section coordinated the 2007 Federal Interagency Conference on Limited English Proficiency, which was held in Bethesda, Maryland, with over ten Federal agencies participating by either contributing funds or hosting sessions. Along with a personal letter from me, invitations were mailed to various entities including governors of each State as well as many local county and city executives and mayors. Other invitees included individuals with responsibility for implementing language access programs across State and local agencies; private entities that fund language access programs; language service providers; Federal officials with authority to focus Federal funding on cross-cutting language access projects; and a wide variety of community advocates and groups. The Conference represented a unique opportunity for invitees to share with and learn from the leaders in the field of LEP access. Over 350 people attended the Conference.

As part of its responsibility to ensure consistent and effective implementation by Federal funding agencies of Title VI and of Title IX of the Education Amendments of 1972, and to ensure implementation of Executive Order 13166 which requires access for LEP individuals, the Coordination and Review Section provided 52 separate training sessions for agencies during Fiscal Year 2006, up from 28 such sessions in 2005. So far in Fiscal Year 2007, the Section has provided 17 sessions. In a section of only seven attorneys and seven coordinator/investigators, this is quite remarkable.

In addition to coordination, outreach, and technical assistance activities for recipients, federal agencies, and the public, the Coordination and Review Section continues to investigate and resolve administrative complaints alleging race, color, national origin (including access for LEP individuals), sex, and religious discrimination. During Fiscal Year 2006, the Section initiated six investigations and completed five investigations that resulted in no violation letters of finding. So far this fiscal year, the Section has initiated nine investigations and has completed seven investigations. At this time, Coordination and Review has a caseload of 55 active investigations, 30 of which involve LEP allegations.

On March 13, 2007, the Division entered into its first LEP settlement agreement. The agreement addresses the needs of a growing LEP population and includes a comprehensive Language Assistance Plan for law enforcement. The Plan covers everything from the 9-1-1 call

center to training for bilingual officers. The Division is monitoring implementation and providing extensive training.

PROFESSIONAL DEVELOPMENT OPPORTUNITIES

One of my highest priorities since taking my oath of office in 2005 has been ensuring that the Division's staff, particularly its attorneys, are afforded every opportunity to improve their professional development. To that end, I established a Professional Development Office within a week of beginning my tenure and detailed two career supervisory attorneys with extensive civil rights litigation experience, one in civil and the other in criminal enforcement, to it. Because of the importance that I attach to this endeavor, I recently appointed a permanent Director of Professional Development who reports directly to my principal deputy.

In its first year, the office took great strides to fulfill its important mandate. Through interviews of the Division's career leadership, a survey of the entire attorney staff, and a series of focus groups with newer attorneys, it devised a week-long orientation program for new Division attorneys. The program presents a mix of basic skills training, including writing, discovery, and evidence, with information on such topics as professional responsibility, ethics, administrative policies, and the importance of promptly responding to congressional correspondence.

The program's inaugural session, conducted in June of 2006, was an unqualified success. We have already held three additional sessions of the program, with the next offering scheduled for October. We plan to continue conducting these programs three or four times a year, as dictated by the pace of attorney hiring.

The office's responsibility also extends to providing advanced training opportunities for more experienced attorneys. In that regard, it has worked closely with the Department's Office of Legal Education, located at the National Advocacy Center (NAC) in Columbia, South Carolina, to provide two programs during 2006 – one on criminal civil rights enforcement and another focused on human trafficking. A seminar on civil enforcement of civil rights statutes was conducted in January 2007 – the first civil program on civil rights enforcement sponsored by the Office of Legal Education since 1996, and we hosted the largest human trafficking training program at the NAC in May, which included participants from Federal and local law enforcement agencies, as well as attorneys in the Division and in U.S. Attorneys' Offices.

In addition, the office has spearheaded the use of the Department's television network to broadcast training on civil rights issues live to departmental offices throughout the country. We created a training series addressing the Division's enforcement responsibility to stem the flow of human trafficking. Two programs have been held, in September 2006 and March 2007, and were widely viewed by Assistant U.S. Attorneys and members of human trafficking task forces around the country. The first installment of a series aimed at enforcement of the Americans With Disabilities Act in May 2007 was very well received.

Several amendments to the Federal Rules of Civil Procedure became effective at the end of 2006. The most significant of these affects the discovery of electronically-stored information.

The office coordinated a series of mandatory training sessions for the Division's civil litigating attorneys on the rights and responsibilities resulting from these revisions.

Finally, the Professional Development Office coordinates the Division's participation in the Department's pro bono program, in which all attorneys are encouraged to take part. The office also coordinates the Mentor Program, which pairs attorneys new to the Division, most of whom are recent law school graduates or judicial clerks, with a more experienced attorney who serves as an informal resource and guide during the new lawyer's first year in the Department.

CONCLUSION

As the Division celebrates its 50 year anniversary, we are reflecting upon the achievements and successes in the struggle for civil rights over the last half century. However, we can not be satisfied. The work of the Civil Rights Division in recent years reflects the need for continued vigilance in the prosecution and enforcement of our nation's civil rights laws. As President Bush has said, "America can be proud of the progress we have made toward equality, but we all must recognize we have more to do." I am committed to build upon our successes and accomplishments and continue to create a record that reflects the profound significance of all Americans.

Testimony before the United States Senate Judiciary Committee

The Civil Rights Division: An Historical Perspective
June 21, 2007

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Chairman Cardin and distinguished members of the committee, thank you for inviting me to testify and provide an historical perspective on the Civil Rights Division of the United States Justice Department.

I was a lawyer in the Division from January 1964 until June 1986 and again from June 1993 to January 1994. I served under Attorneys General from Robert Kennedy to Ed Meese and then for six months as acting Deputy Assistant Attorney General under Attorney General Janet Reno. Since 1986 I have been Professor of Law at the University of Pacific, McGeorge School of Law, in Sacramento. I have written two books about the work of the Division, *Enforcing Civil Rights*, and *Free at Last to Vote: The Alabama Origins of the Voting Rights Act*. I am a founding member of the Civil Rights Division Association, a group of former and current Division employees which sponsors periodic conferences about the work of the Division.

I am very proud of the accomplishments of the Civil Rights Division in combating racial and other forms of discrimination in voting, housing, schools, employment, public accommodations, and federally assisted programs. The Division's work has helped make significant inroads, but much remains to be done.

Although the history is familiar, I think it important to begin with a reminder about the role of the Department of Justice during Reconstruction. The federal government first enforced civil rights during Reconstruction. Southern white resistance to rights for the newly freed slaves led to adoption of the 14th & 15th amendments, a series of civil rights acts, enforcement by DOJ, and military occupation that thwarted backsliding. With the end of Reconstruction, however, the troops were withdrawn, the Supreme Court issued decisions narrowing the scope of civil rights, and Congress repealed many civil rights protections. The Court and Congress stripped the Department of Justice of most of its enforcement responsibility. *Plessy v. Ferguson* in 1896 effectively shifted from protecting the rights of African-Americans to protecting the rights of whites to be free from unwanted association with them. The country missed an opportunity to put the legacy of slavery behind us, and instead tolerated the growth of a racial caste system, in which, through law and custom, whites subordinated blacks in American society. The result of that history is an understandable fear by many that the second Reconstruction, of the 1950's and 1960's, will meet the same fate as the first.

From roughly 1876 to 1956 there was minimal federal enforcement of civil rights, based

on the small criminal law remnants from Reconstruction. Civil rights were treated like contracts, torts, domestic relations, property disputes, and other private civil disagreements, as were civil liberties.

The second Reconstruction arguably began with *Brown v. Board of Education*, but it could not take full effect until Congress joined the effort. A bipartisan Congress joined with President Eisenhower in empowering the Department of Justice to enforce civil rights. The 1957 Act was deemed necessary because private litigation had failed to eradicate the racial caste system that infected much of the country, especially the Deep South.

The Division, as created by the Civil Rights Act of 1957, had a very narrowly defined mandate: enforce the Fifteenth Amendment's ban on race discrimination in the voting process and enforce criminal civil rights laws. Congress considered and rejected a broad grant of authority that would have allowed the Department Of Justice to bring suit to redress all violations of the Fourteenth Amendment. The law did not authorize federal enforcement against private racial discrimination, or against state and local government discrimination in education, housing, employment, or federally assisted programs.. Nor did it authorize the Department to sue to redress violations of such rights as the freedom of speech. The scope of federal enforcement responsibility has expanded greatly in the years since 1957. But Congress has never legislated that every violation of civil rights or liberties can be redressed by a government agency; even today, many such violations can be redressed only through private suit.

When Congress authorizes federal enforcement of a law, it is in effect saying that violation of that law undermines the public interest and that private enforcement alone is inadequate. Private enforcement is aimed primarily at redressing wrongs to individuals; DOJ enforcement does that, but, more important, it upholds important national policies. So one question one must ask as we explore the federal role in civil rights enforcement is what are the important national needs. What issues rise to the level of requiring federal, rather than private, enforcement? Passage of a law authorizing DOJ litigation to secure specified rights normally helps answer these questions. However, each administration also addresses that question when it allocates resources within the Civil Rights Division. Since the enforcement responsibilities today extend so broadly, the Division must make choices among competing priorities.

For its first ten years, from 1957 to 1967, virtually all the Division's resources were devoted to combating racial discrimination against African-Americans in the deep South, not because they were considered DOJ's clients, but because the racial caste system was viewed as destructive of American ideals of democracy and equality and as undermining our society and economy.

The Division developed proactive enforcement techniques starting in 1960, under Assistant Attorney General Harold Tyler and his deputies, John Doar and St. John Barrett. Doar and Barrett, both Republicans, were retained by President Kennedy who appointed a corporate lawyer, Burke Marshall to replace Tyler as Assistant Attorney General. Marshall added lawyers and retained the enforcement techniques:

i. CRD lawyers were no longer desk lawyers; they traveled to the South and came to know its people, black and white.
ii. Given the failure of the FBI in the 1950's and 1960's to discover discrimination that was staring it in the face, Division lawyers became investigators and developed the facts of their cases.
iii. Once a lawyer developed the facts, the lawyer wrote a memorandum either recommending that the matter be closed or that DOJ sue.
iv. That memorandum, the "Justification memorandum" or "J memo," then became the basis of review by supervisors, up to the Assistant Attorney General or even the Attorney General. Often dialogue ensued over the facts and theory of the case. Although theoretically all that was involved was applying the law to the facts, the legal principles were not well developed, so the Division lawyers and leadership had to develop and agree on legal arguments.
v. This method led to iron-tight cases, so that when Southern district judges ruled against the government, it would almost invariably prevail on appeal.

In sum, the Division was formed to eradicate the racial caste system; it took a proactive approach to this mission; and despite the inevitable tensions between political appointees and civil service lawyers, the two groups worked closely together.

The responsibilities assigned to the Division have expanded since those early years, but the basic structure remained in place at least until the current administration. Changes in administration have always been accompanied by changes in priorities and policies, but eliminating race discrimination has always been a high priority, as has elimination of sex and national origin discrimination. Congress has repeatedly reaffirmed the need for strong enforcement of antidiscrimination laws, most recently by its bipartisan extension of the Voting Rights Act.

There has always been a period of adjustment when the presidency shifted between parties, as the career attorneys and the new political appointees learned to work together, and occasional flare-ups of policy-based resignations of career lawyers. Curiously, each administration regards the career employees as holdovers from the prior administration. For example, I recall that Lawrence Wallace joined the Solicitor General's office under President Lyndon Johnson and played a key role in developing the government's Supreme Court brief in *Green v. County School Board* in 1968. That brief strongly supported the complete dismantling of the racially dual school systems. Yet, Joe Califano's memoir describes Wallace as a Nixon administration holdover. Later, the Reagan administration considered him a Carter administration holdover. I worked with him for almost twenty years and can only say that he was a consummate professional, as were most of the Civil Rights Division career staff. One further personal note: I disagreed with some of the civil rights policies of the Reagan administration. I worked for Assistant Attorney General William Bradford Reynolds, the administration's foremost spokesperson on civil rights. We engaged in many heated discussions

of what position to take in cases. We listened to one another, and occasionally one or the other of us would change his mind. I respected the fact that he represented the President the people had elected and that the Senate had confirmed his nomination. He respected my knowledge of civil rights law and my ability to analyze cases.

The work of the Division has been marked by several characteristics that have contributed to its mission of securing equal justice under the law. First, the Division staff and leaders have been sensitive to the fact that it is a law enforcement agency. It is not an administrative agency and it does not exist to serve special interest groups. Its job is to pursue the public interest as set forth in the laws Congress has given the Division to enforce, and to do so in an appropriate manner. John Doar taught us that Division lawyers must be the epitome of rectangular rectitude. He turned around the famous Holmes phrase, "Men must turn square corners when they deal with the Government,"[1] and insisted that CRD attorneys always turn square corners. Central to turning square corners is following fair and established procedures. As Justice Frankfurter noted, procedural regularity generates "the feeling, so important to a popular government, that justice has been done."[2] Equally important is honest evaluation of the law and the facts, and the courage to say no to political pressures. Attorney General Kennedy refused to base the public accommodations provisions of the 1964 Civil Rights Act on the Fourteenth Amendment, because he determined that the case law would not support that ground; instead, and in spite of criticism from members of Congress, he insisted on relying on the Commerce Clause. In 1981, Solicitor General Rex Lee resisted great pressure to change position in a case involving sex discrimination against teachers, even when Department of Education lawyers argued, "but we won the election." In 1977, Solicitor General Wade McCree refused to make an all-out defense of affirmative action in the *Bakke* case, despite enormous pressure from cabinet secretaries and civil rights groups. In 1973, Solicitor General Erwin Griswold refused to sign a patently frivolous antibusing Supreme Court paper. In 1975, Attorney General Edward Levi likewise refused to file a brief opposing busing in Boston, despite great pressure to do so. All these decisions were made after careful consideration of the competing arguments about facts, law and policy.

A related characteristic of the CRD is that it has largely filled its career attorney positions through the Attorney General's Honors program. Attorney General Brownell instituted this program in 1954 in order to end perceived personnel practices "marked by allegations of cronyism, favoritism and graft." The Honors program is supposed to operate without consideration of ideology or partisan affiliation. This exclusion of ideological or partisan connections goes well beyond the restrictions in the Hatch Act. The result has been a highly professional staff, chosen based on merit and on commitment to equal justice.

Related to the tradition of a professional, non-partisan, highly qualified staff is a tradition

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[1] *Rock Island, Ark. and La. R.R. v. United States*, 254 U.S. 141, 143 (1920).

[2] *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951).

of interchange between career staff and political appointees. This is a system established by Congress in the civil service laws, and it is a good system. The two tend to operate as checks and balances on one another. The interaction between career staff and political appointees has checked each from carrying out an improper agenda. New administrations come in full of ideas for change, but if they fail to pay serious attention to career staff, they will make bad mistakes. The most well-known example, perhaps, is the *Bob Jones* case in 1981, where the incoming Reagan administration reversed longstanding positions of the Department and the Internal Revenue Service withholding tax exempt status from educational institutions that engaged in racial discrimination. The Supreme Court strongly rejected the Department's new position.

These characteristics form the basis for something every lawyer must have: credibility. Division lawyers must often make unpopular arguments. If the judges and the public believe that the Division turns square corners, that its lawyers are fairly chosen public servants, that the positions in cases depend upon an objective analysis of the law and the facts, its lawyers will have credibility. Without those characteristics, credibility will be lost, and it will be far more difficult for the Division to do its job of enforcing the civil rights laws.

Finally, in this fiftieth year since the adoption of the first modern federal civil rights law, how should the Division determine its priorities? The Civil Rights Division's responsibilities have become so diffuse that it would be easy for the Division to spend all of its resources on issues other than those that led to its creation. According to Assistant Attorney General Kim, however, over half the briefs filed by the Appellate Section were on behalf of the Office of Immigration Litigation, a branch of the Civil Division. Look at the Division's website. There is now a special counsel for religious discrimination; there is a comprehensive and impressive report on efforts to combat human trafficking. However, there is little on the site about efforts to combat racial discrimination against people of color. Yet the core responsibilities Congress has assigned to the Division relate to discrimination based on race, national origin, sex, and disability in voting, schools, housing, public accommodations, federally assisted programs, and employment. The black poverty level continues to be more than twice the white poverty level; housing segregation persists, reinforcing school segregation. In my view racial discrimination is a core disease in this country, and the future of civil rights enforcement requires that combating racial discrimination continue to occupy a central priority in the Division's work.

Thank you for the opportunity to present this testimony. I will be happy to answer any questions the Committee may have.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 12, 2006

The Honorable F. James Sensenbrenner
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter dated February 28, 2006, requesting information about the Civil Rights Division. You first requested information about the Division's procedures in Voting Rights Act cases.

The Voting Section of the Civil Rights Division employs a consistent and straightforward decision-making process. Regardless of the type of decision to be made – whether to file a lawsuit, to make a determination under Section 5, or to provide legal arguments – the decision-making process begins with a careful analysis of the facts and the legal elements at issue. Justice Department attorneys have great legal skill and knowledge. They are expected to identify all of the relevant facts, legal issues and other concerns that bear upon a law enforcement decision. This process often begins with a search for relevant and reliable evidence. Voting Section attorneys interview potential witnesses; locate, authenticate and review documents; corroborate potential facts; and track back from the many second- and third-hand allegations, regularly received by the Section, in order to identify trustworthy evidence. After identifying and obtaining evidence that bears upon a particular course of action, Section attorneys identify and explore potential defenses. They are responsible for making recommendations that follow the law as written by the Congress and interpreted by the judiciary. Varied and sometimes contradicting views are encouraged. Only after this careful process, does a matter move forward for decision.

Each stage of the decision-making process is interactive. The activity of Department attorneys is guided and encouraged at every step by more senior attorneys, typically Special Litigation Counsel and Deputy Section Chiefs, as well as by the Chief of the Voting Section. Each of these supervisors is a career attorney, as well, with significant experience in civil rights and voting rights litigation. The current Voting Section Chief has been with the Civil Rights Division for over 30 years. The Section Chief is responsible for presenting the Section recommendation to Division leadership. Under 28 C.F.R. 51.3, the Chief of the Voting Section

has the authority to preclear state voting redistricting plans submitted under Section 5 of the Voting Rights Act.

The Department of Justice rightly expects the highest standards and strict adherence to the law by its attorneys. Nowhere is such fidelity more important than when addressing the sensitive areas touched on by the Voting Section, where we strive to maintain the highest standards of professionalism.

Citing *Johnson v. Miller,* 864 F. Supp. 1354 (S.D. Ga. 1994); *Miller v. Johnson,* 515 U.S. 900 (1995); *Abrams v. Johnson,* 521 U.S. 74 (1997); and *United States v. Jones,* 125 F.3d 1418 (11th Cir. 1997), you also requested information of any "instances, past or present, where the Civil Rights Division's legal work was either admonished in a court opinion or where the Division paid attorneys' fees or settlement fees over its involvement in a lawsuit." The following cases arguably contain "admonish[ments]" similar in degree to those in the cases that you cited or involve the payment of attorneys' or settlement fees for purportedly unfounded litigation. While the Department fully respects and accepts the court rulings, judicial statements, dispositions and payments in these matters, we do not concede by listing them here that each was warranted.

1. *Johnson v. Miller.* In 1992, the Voting Section of the Civil Rights Division precleared a legislative redistricting plan in Georgia, after rejecting two previous plans because there were only two majority black districts. In 1994, voters challenged the constitutionality of the state's Eleventh Congressional District, contending that it was a racial gerrymander, and sought to enjoin its use in congressional elections. Shortly after the case was filed, the Voting Section intervened as a defendant. The plaintiffs prevailed. 864 F. Supp. 1354 (S.D. Ga. 1994) (Copy of opinion enclosed as Attachment A). As relevant to your request, the court stated, "[d]uring the redistricting process, [the ACLU attorney] was in constant contact with . . . the DOJ line attorneys overseeing preclearance of Georgia's redistricting efforts. . . . The Court was presented with a sampling of these communiques, and we find them disturbing. It is obvious from a review of the materials that [the ACLU attorney's] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." *Id.* at 136; *see also id.* (Voting Section attorneys' "professed amnesia [about their relationship with the ACLU attorney] less than credible"); *id.* at 1364 ("Though counsel for the United States objected to Plaintiffs' 'characterization that the Justice Department "suggested things" [to the General Assembly],' it is disingenuous to submit that DOJ's objections were anything less than implicit commands.") (citation omitted); *id.* at 1367-68 ("the Department of Justice had cultivated a number of partisan 'informants' within the ranks of the Georgia

legislature". . . ."We find this practice disturbing."); *id.* at 1368 ("the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment"); *id.* ("It is surprising that the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote.").

In 1994, the United States appealed *Johnson v. Miller* to the U.S. Supreme Court, arguing that evidence of a legislature's deliberate use of race in redistricting is insufficient to establish a racial gerrymander claim. The Court found for the plaintiffs-appellees. *Miller v. Johnson*, 515 U.S. 900, 910 (1995) (Copy of opinion enclosed as Attachment B). As relevant to your request, the Court stated, "[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts. Although the Government now disavows having had that policy and seems to concede its impropriety, the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia's first two plans." *Id.* at 924-25 (citations omitted). *See also id.* at 926 ("The Justice Department's maximization policy seems quite far removed from [Section 5 of the VRA]'s purpose."); *id.* at 927 ("the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' authority under [Section] 2 of the Fifteenth Amendment into tension with the Fourteenth Amendment.") (citation omitted). In 1995, the Department agreed to pay $202,000 to settle plaintiffs' interim claims for attorneys' fees. In 1997, the Department agreed to pay an additional $395,000 to settle plaintiffs' remaining claims for attorneys' fees, expenses and costs.

2. *Hays v. State of Louisiana.* In 1992, the Voting Section of the Civil Rights Division precleared a redistricting plan for Louisiana. The same year, voters sued Louisiana, contending, among other things, that the plan constituted impermissible gerrymandering in violation of the Equal Protection Clause. The Voting Section initially participated as *amicus curiae* in September 1992 and subsequently intervened as a defendant in July 1994. The district court held the plan to be unconstitutional. 839 F. Supp. 1188 (W.D. La. 1993) (Copy of opinion enclosed as Attachment C). As relevant to your request, the court stated, "neither Section 2 nor Section 5 of the Voting Rights Act justify the [U.S. Attorney General's Office's] insistence that Louisiana adopt a plan with two safe, black majority districts." *Id.* at 1196 n.21; *see also id.* (DOJ's position was "nothing more than...'gloss' on the Voting Rights Act – a gloss unapproved by Congress and unsanctioned by the courts."); *id.* ("[the Assistant Attorney General's Office] arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies.").

Louisiana enacted a new redistricting plan. The district court struck down the revised plan. 936 F. Supp. 360 (W.D. La. 1996) (*per curiam*) (Copy of opinion enclosed as Attachment D). As relevant to your request, the court stated, "the Justice Department impermissibly encouraged -- nay, mandated -- racial gerrymandering." *Id.* at 369. The court also noted that "the Legislature succumbed to the illegitimate preclearance demands of the Justice Department." *Id.* at 372; *see also id.* at 363-64, 368-70. In 1999, the Department agreed to pay $1,147,228 to settle claims for attorneys' fees, expenses, and costs.

3. *Scott v. Department of Justice.* On August 12, 1992, the Voting Section of the Civil Rights Division precleared a redistricting plan in Florida. In 1994, voters sued the Department and the State of Florida, contending that the state's configuration for a certain Senate district violated the Equal Protection Clause. After the Supreme Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995), and *United States v. Hays*, 515 U.S. 737 (1995), the parties agreed to proceed by mediation. The district court approved the mediated settlement (which did not address attorneys' fees) in March 1996. *Scott v. Department of Justice*, 920 F. Supp. 1248 (M.D. Fla. 1996). In 1999, the Department and plaintiffs settled plaintiffs' claims for attorneys' fees, expenses and costs for $95,000.

4. *United States v. City of Torrance.* In 1993, the Employment Litigation Section of the Civil Rights Division brought suit, alleging that the City of Torrance, California, had engaged in a pattern or practice of discrimination in its hiring of new police officers and firemen. The defendant prevailed. The district court concluded that the Division's actions violated Rule 11 of the Federal Rules of Civil Procedure, or alternatively 42 U.S.C. 2000e-5(k), and awarded attorneys' fees. The Ninth Circuit affirmed the district court. 2000 WL 576422 (9th Cir. May 11, 2000) (Copy of opinion enclosed as Attachment E). The court stated that attorneys' fees may be awarded in a Title VII case when the plaintiff's action is "frivolous, unreasonable, or without foundation." *Id.* at *1 (citation quotation marks omitted). As relevant to your request, the court stated, "[i]n this case, the record amply supports the district court's determination that this standard was satisfied, that is, 'that the Government had an insufficient factual basis for bringing the adverse impact claim' and 'that the Government continued to pursue the claim . . . long after it became apparent that the case lacked merit.'" *Id.* The Ninth Circuit affirmed the district court's award, in 1998, of $1,714,727.50 in attorneys' fees.

5. *United States v. Jones.* In 1993, the Voting Section of the Civil Rights Division sued county officials in Dallas County, Alabama, under Section 2 of Voting Rights Act and the Fourteenth and Fifteenth Amendments. The Division alleged that at least fifty-two white voters who did not reside in a black-majority district

were improperly permitted to vote in that district. The defendants prevailed and the district court ordered the government to pay attorneys' fees under the Equal Access to Justice Act ("EAJA"), 22 U.S.C. 2412(d)(1(A). The Eleventh Circuit affirmed. As relevant to your request, the court stated that a "properly conducted investigation would have quickly revealed that there was no basis for the claim that the Defendants were guilty of purposeful discrimination against black voters. . . . The filing of an action charging a person with depriving a fellow citizen of a fundamental constitutional right without conducting a proper investigation of its truth is unconscionable. . . . Hopefully, we will not again be faced with reviewing a case as carelessly instigated as this one." 125 F.3d 1418, 1431 (11th Cir. 1997) (Copy of opinion enclosed as Attachment F). In 1995, the district court ordered the Department to pay $73,038.74 in attorneys' fees and expenses. In 1998, the appellate court ordered the Department to pay an additional $13,587.50 in attorneys' fees.

6. *Motoyoshi v. United States*. In 1993, the Office of Redress Administration of the Civil Rights Division denied compensation to a Japanese-American man relocated during World War II. He filed suit challenging the denial. The district court granted the plaintiff's motion for summary judgment. As relevant to your request, the court stated that the Department's "failure to consider and determine plaintiff's eligibility for compensation . . . was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 33 Fed. Cl. 45, 52 (1995) (Copy of opinion enclosed as Attachment G). In 1995, the court ordered the Department to pay $8,437 in attorneys' fees under the EAJA.

7. *United States v. Tucson Estates Property Owners Association, Inc.* In 1993, the Housing and Civil Enforcement Section of the Civil Rights Division brought suit alleging that an owners' association in Tucson violated the Fair Housing Act. The defendants prevailed on summary judgment. *United States v. Tucson Estates Prop. Owners Ass'n, Inc.* No. 93-503, slip op. (D. Ariz. Nov. 7, 1995) (Copy of order is enclosed as Attachment H). As relevant to your request, the court stated, "it is not a reasonable *legal* basis that the United States lacked in this case; it was the *factual* basis upon which its legal theory rested that was unreasonable. Based on the totality of the circumstances present prior to and during litigation, this Court finds that the United States' position was not substantially justified." *Id.* at 5 (emphasis in original) (citation and quotation marks omitted). In 1995, the court ordered the Department to pay $150,333.07 in attorneys' fees and expenses under the EAJA.

8. *United States v. Laroche*. In 1993, the Housing and Civil Enforcement Section of the Civil Rights Division brought a Fair Housing Act suit in federal district court in Oregon. The defendants prevailed on summary judgment. The court awarded

defendants $17,885.78 in attorneys' fees and costs. The United States appealed. During the pendency of the appeal, the parties entered into a settlement and filed a joint stipulation of dismissal on April 24, 1995. The district court withdrew and rendered void its rulings on summary judgment and attorneys' fees and dismissed the case on December 28, 1995.

9. *Smith v. Beasley* and *Able v. Wilkins* (consolidated cases). In 1994, the Voting Section of the Civil Rights Division precleared South Carolina State House districts, and then precleared State Senate Districts in 1995. Voters challenged the constitutionality of South Carolina House and Senate districts created by the state legislature in two separate actions, which were consolidated. The Voting Section intervened as a defendant in the House action on May 3, 1996. On September 27, 1996, the court found that six of nine House districts and all three Senate districts were unconstitutional as they were drawn with race as the predominant factor. As relevant to your request, the court stated, "[t]he Department of Justice's advocacy position is evidenced in many memoranda, letters and notes of telephone conversations, but most particularly by the apparent epidemic of amnesia that has dimmed the memory of many DOJ attorneys who were involved with South Carolina's efforts to produce a reapportionment plan that would pass preclearance." 946 F. Supp. 1174, 1190-91 (D.S.C. 1996) (Copy of opinion enclosed as Attachment I); *see also id.* at 1208 ("[t]he Department of Justice in the present case, as it had done in *Miller*, misunderstood its role under the preclearance provisions of the Voting Rights Act. Here, Department of Justice attorneys became advocates for the coalition that was seeking to maximize the number of majority [black voting age population] districts in an effort to achieve proportionality. . . . It is obvious that the Voting Section of the Department of Justice misunderstands its role in the reapportionment process."). In 1996, the Department settled plaintiffs' claims for attorneys' fees and costs for $282,500.

10. *United States v. Weisz*. In 1994, the Housing and Civil Enforcement Section of the Civil Rights Division initiated a religious discrimination suit under the Fair Housing Act. The district court granted defendant's motion for judgment on the pleadings. 914 F. Supp. 1050, 1055 (S.D.N.Y. 1996). In 1997, the Department settled the issue of attorneys' fees and costs for $7,857.50.

11. *Abrams v. Johnson*. In 1996, the United States appealed a later proceeding in *Johnson v. Miller* to the Supreme Court, alleging that the district court's plan did not defer to the legislative preferences of the Georgia Assembly because it had only one majority-black district when all previous Assembly plans had two, and that it diluted minority voting strength by not adequately representing the voting interests of Georgia's black population, in violation of the Voting Rights Act. The Court found for the plaintiffs-appellees. 521 U.S. 74 (1997) (Copy of opinion

> enclosed as Attachment J). As relevant to your request, the court made a number of statements. *E.g., id.* at 90 ("Interference by the Justice Department, leading the state legislature to act based on an overriding concern with race, disturbed any sound basis to defer to the 1991 unprecleared plan; the unconstitutional predominance of race in the provenance of the Second and Eleventh Districts of the 1992 precleared plan caused them to be improper departure points; and the proposals for either two or three majority-black districts in plans urged upon the trial court in the remedy phase were flawed by evidence of predominant racial motive in their design."); *id.* at 93.

In total, the Division was ordered to pay or agreed to pay $4,107,595.09 from 1993 to 2000 in the eleven cases specified above. In searching for instances where the "Division's legal work" has been "admonished in a court opinion," we have diligently searched through both published and unpublished judicial decisions available on electronic databases. In searching for instances "where the Division paid attorneys' fees or settlement fees over its involvement in a lawsuit," we also have diligently searched through financial records maintained by the Division for such expenditures of government funds. We note that these records are only complete for the past thirteen fiscal years. Consistent with your request, our summary does not include cases where the Department was only assessed costs pursuant to Fed. R. Civ. P. 54(d)(1), which provides for the prevailing party in an action to be awarded costs other than attorneys' fees by the losing side "as of course." Please be aware, however, that the amounts paid by the Division in seven of the eleven cases listed above may include such costs because those settlement agreements or court orders did not separate costs from attorneys' fees. In the event that we discover any additional information responsive to your February 28, 2006, letter, we will supplement this letter in a timely manner.

Thank you for the opportunity to address the work of the Civil Rights Division. Please do not hesitate to contact the Department of Justice if we can be of further assistance in this or any other matter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Attachments

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

Testimony of Helen Norton, University of Maryland School of Law
before the United States Senate Committee on the Judiciary

Civil Rights Division Oversight
June 21, 2007

Thank you for the opportunity to testify today. My name is Helen Norton, and I am currently a professor at the University of Maryland School of Law. I served as a political appointee in the Civil Rights Division from 1998 until January 2001, first as Counsel to the Assistant Attorney General for Civil Rights and later as a Deputy Assistant Attorney General for Civil Rights, where my duties included supervision of the Employment Litigation Section.

My testimony will focus on the Civil Rights Division's Title VII enforcement efforts during the Bush Administration. As you know, Title VII of the Civil Rights Act of 1964 forbids job discrimination on the basis of race, color, national origin, sex, and religion. Enacted to bring to life our nation's dream of equal employment opportunity for all, it is among our most important federal antidiscrimination laws.

Congress empowered the Department of Justice to enforce Title VII with respect to state and local government employers. The Attorney General, in turn, has assigned this enforcement responsibility to the Civil Rights Division's Employment Litigation Section. This authority is critically important, as state and local governments employ over 18 million workers in a wide variety of jobs, including sheriffs, teachers, firefighters, bus drivers, police officers, custodians, managers, transportation and utilities workers, and health care providers. Some of these jobs offer entry-level gateways to employment and economic security, while others stand at the top levels of state and local leadership.

State and local governments that discriminate in employment not only unfairly deny access to important job opportunities, but also rob their communities of the talents of a significant segment of the population. Such discrimination, moreover, imposes additional harm by communicating to the public that government is not committed to equality and justice for all.

Despite the importance of its role in securing Title VII's antidiscrimination protections, however, the Civil Rights Division's Title VII enforcement efforts have declined substantially since January 20, 2001. In short, the Division has filed and resolved substantially fewer Title VII lawsuits of all kinds when compared to the previous Administration.

Furthermore, the cases that the Division has filed reveal a disquieting shift in enforcement priorities, as its docket -- now significantly reduced -- devotes an even smaller proportion of its resources to job discrimination experienced by African-Americans and Latinos. To be sure, all individuals are entitled to be free of job

discrimination based on race, color, national origin, sex, and religion. But Title VII's enactment – and, indeed, the Division's establishment -- during the civil rights movement came in direct response to the historic, and still continuing, injustice experienced by African-Americans and other minorities. The Division must not retreat from that legacy now.

Please note that Title VII empowers the Department of Justice to bring two types of lawsuits under Title VII. Each serves important, but different, functions. First, Section 707 of Title VII authorizes the Department to bring pattern-and-practice cases against state and local government employers that systematically deny job opportunities to workers because of their race, color, sex, national origin, or religion. Examples of pattern-and-practice cases include intentionally discriminatory practices, such as an employer's consistent refusal to hire people of color, or to assign women to certain jobs, or to pay workers equally regardless of their national origin.

Pattern-and-practice cases also include challenges to facially neutral practices that impose a disparate impact against minorities and/or women without predicting effective job performance. Examples of such artificial barriers to opportunity include a suburban agency's requirement that candidates have lived in the community for at least a year before applying for employment, effectively excluding from consideration people of color living in nearby cities with significant minority populations.

The Division's forceful assertion of its pattern-and-practice authority – including its willingness to bring disparate impact actions -- is essential for at least two reasons. First, cases brought under section 707 carry significant potential to enhance workplace equality because they affect large numbers of employees and target systemic discrimination for reform. Second, these cases' factual and legal complexity demand levels of expertise and resources uniquely held by the Department of Justice and often unavailable to public interest attorneys and other members of the private bar.

Next, section 706 of Title VII empowers the Department of Justice to bring suit against state and local government employers on behalf of an individual victim of discrimination after that individual has filed a charge of discrimination with the EEOC and the EEOC has investigated the charge, found reasonable cause to believe discrimination has occurred, sought unsuccessfully to conciliate the case, and referred the matter to the Division for possible litigation.

The Division's vigorous exercise of its authority under section 706 valuably furthers Title VII's core purposes because it allows the Division to target – and thus help develop the law in -- cases dealing with emerging discrimination issues. It also enables the Division to pursue cases, especially in small communities, that the private bar may be unable to handle.

With this as background, several disturbing trends emerge when we examine the Division's Title VII enforcement efforts since January 20, 2001. Quantitatively, the Division's measurable enforcement activity – in terms of suits both filed and resolved --

has tumbled significantly when compared to that of the previous Administration. Qualitatively, the Division's record reveals a troubling shift in priorities, as it now invests considerably less in cases on behalf of African-Americans and Latinos generally, as well as in pattern-and-practice cases, especially those alleging disparate impact violations and those challenging systemic sex, race, and national origin discrimination.

One especially valuable enforcement measure, for example, examines the number of successful resolutions of Title VII suits through judgments, consent decrees, and out-of-court settlements. Such resolutions directly further Title VII's core purposes by providing compensation for victims of discrimination and securing changes to employers' discriminatory practices. But the Division has resolved only 46 Title VII cases since January 20, 2001, including only 8 pattern-and-practice cases.[1] In contrast, the Division during the Clinton Administration resolved approximately 85 Title VII complaints, including more than 20 pattern-and-practice cases.

Another helpful measure of enforcement activity tracks the number and types of complaints filed under Title VII: so long as illegal job discrimination remains a problem, we should expect continued Title VII case filings. Here, too, the Division's efforts fall significantly short of those under the previous Administration. More specifically, the Section filed a total of only 39 Title VII cases from January 20, 2001 through June 20, 2007 (a period of six years and five months, or approximately 80% of an eight-year Administration). If the Division continues at this pace, it can be expected to file approximately 49 cases over two full terms – just over half of the nearly 90 Title VII complaints filed during the two-term Clinton Administration.

Of the 39 Title VII complaints filed by the Division during the current Administration, only 13 included pattern-and-practice claims brought under section 707.[2] Only four were brought on behalf of African-Americans and Latinos, only two on behalf of women, two on behalf of white men, one on behalf of Native Americans, and four alleged religious discrimination.

If this pace continues, the Section can be expected to file approximately 16-17 pattern-and-practice cases over two full terms. In contrast, the Section filed approximately 25 such cases during the Clinton Administration.[3] Those filings included 13 pattern-and-practice cases alleging race discrimination (several of which also included allegations of national origin and/or sex discrimination) and 12 alleging sex discrimination.

Of the 13 pattern-and-practice claims filed during this Administration, only four – less than a third -- included disparate impact claims. In contrast, the vast majority of pattern-and-practice cases filed during the Clinton Administration involved disparate impact challenges.

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[1] Enforcement data for the Bush Administration is drawn from the Division's website at http:www.usdoj.gov/crt/emp/papers.html, last visited June 20, 2007.
[2] Two of these also included claims of individual discrimination filed under section 706.
[3] Eight of these also included claims of individual discrimination filed under section 706.

Turning to the Division's Title VII docket on behalf of individual victims of discrimination, of the 39 total Title VII complaints filed by this Administration, only 28 included claims of individual discrimination under section 706.[4] During this Administration, the Division has yet to file a national origin claim under section 706 on behalf of a Latino.

Of the complaints filed under Section 706 since January 20, 2001, 17 alleged sex discrimination,[5] only four included allegations of race discrimination against African-Americans, two included allegations of race discrimination against whites, two alleged religious discrimination, one alleged retaliation, one alleged discrimination against a Native American, and one alleged discrimination against a victim of South Asian national origin (in addition, one race discrimination complaint failed to identify the alleged victim's race, while another involved allegations of race and national origin discrimination on behalf of white, Filipino, Native American, and African-American victims).

If this pace continues, over two full terms the Division can be expected to file approximately 35 cases under section 706. This is just half of the nearly 70 cases[6] filed under section 706 during the previous Administration, which included ten cases alleging race discrimination (including two alleging discrimination against whites), 3 alleging national origin discrimination, 39 alleging sex discrimination, 11 alleging religious discrimination, and six alleging illegal retaliation against individuals asserting their Title VII rights.

In short, the Division has resolved and filed substantially fewer Title VII lawsuits of all types when compared to the previous Administration. Moreover, it has filed considerably fewer cases of any kind on behalf of African-Americans and Latinos, and it has filed significantly fewer pattern-and-practice cases, especially those alleging disparate impact violations, as well as those challenging systemic sex, race, and national origin discrimination.

This downturn in measurable Title VII enforcement activity is all the more disconcerting given that significantly more attorneys have been assigned to the Employment Litigation Section during the Bush Administration (35-36 lawyers on average) than during the Clinton Administration (30-31 lawyers on average).

Finally, as yet another indication of a disturbing shift in its Title VII enforcement priorities, the Department of Justice has too often failed to defend longstanding government interpretations of Title VII that fulfilled the law's twin objectives of deterring discrimination and compensating victims. Most recently, for example, in *Ledbetter v. Goodyear Tire & Rubber Co.*, the Department filed an amicus brief in the

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[4] Two of these also included claims of pattern-and-practice discrimination under section 707.

[5] Two of these also included allegations of race discrimination – one against an African-American and the other against a Native American. I double-counted those claims, including them also in the tallies of cases on behalf of African-Americans and Native Americans.

[6] Eight of these also included claims of pattern-and-practice discrimination under section 707.

Supreme Court that repudiated the EEOC's position that each paycheck that pays a woman less than a similarly situated man because of her sex is an act of discrimination that violates Title VII. Arguing that the EEOC's reading "lacks persuasive force and is not entitled to deference," the Department urged instead that the plaintiff had lost her right to challenge pay discrimination because she did not do so within 180 days of the pay-setting decision, even if she continued to suffer from unequal pay for years thereafter. The Court sided with the Department by a 5-4 margin just a few weeks ago, but, as Justice Ginsburg noted in dissent, this interpretation frustrates Title VII's core purposes and is woefully out of step with workplace reality. While members of Congress have already introduced legislation to correct this interpretation, the Department's abandonment of the EEOC's position to advocate instead for a cramped understanding of Title VII remains deeply unsettling.

Similarly, the Department of Justice undermined another well-established EEOC position last year in *Burlington Northern & Santa Fe Railway Co. v. White*. That case centered on Title VII's anti-retaliation protections, which bar discrimination against individuals who have asserted their rights under Title VII – for example, by reporting possible discrimination, filing a complaint, participating in an investigation, or testifying at a proceeding. The EEOC had long interpreted this provision to forbid any act of retaliation that is reasonably likely to deter the charging party or others from engaging in protected activity, regardless of whether the employer's retaliation took place on the job or in some other setting. But in its amicus brief to the Supreme Court, the Department instead urged the considerably narrower view that only materially adverse changes in the terms, conditions, or privileges of employment constitute unlawful retaliation. Eight Justices ultimately rejected the Department's position as inconsistent with both Title VII's plain language and its underlying purposes.

Taken together, these developments reveal cause for deep concern about the Department's commitment to the forceful interpretation and enforcement of Title VII's antidiscrimination protections. They represent a troubling retreat from the Division's longstanding leadership role in the ongoing struggle to transform our national promise of equal opportunity into reality. The Division can and should do better in advancing job opportunities for more workers of all protected classes. We can all agree that civil rights enforcement should not be a partisan concern, and we should be able – despite any political differences -- to demonstrate a shared commitment to equal employment opportunity.

June 21, 2007

Dear Members of the Senate Committee on the Judiciary,

We write with regard to the oversight hearing of the Civil Rights Division of the U.S. Department of Justice to be held today by the Committee on the Judiciary. We write in particular to state our appreciation and support for the increased attention that the Division has given over the past several years to the support and defense of religious liberty -- the civil right we would denote as our nation's "first freedom."

While each of our diverse organizations may not support the precise legal position taken by the Division in every religious liberty matter it has undertaken -- indeed some of us have been on the other side of several positions asserted by the division -- we all agree and support the principle that religious liberty issues should be placed among the top priorities of the Division's work.

While, in the decades following its creation, the Division focused its efforts on important civil rights issues, religious liberty and discrimination cases often did not receive as vigorous attention. A number of us urged the Administration taking office in 2001 to have the Civil Rights Division invigorate its work in the religious liberty arena and they have done so. Former Attorney General John Ashcroft created the position of Special Counsel for Religious Liberty within the Division, and that position has continued under Attorney General Alberto Gonzales. The Special Counsel's focus and attention has been beneficial to Americans of many faith communities.

To be sure, different categories of civil rights -- whether protecting religious liberty or other interests -- should not be placed in competition with or pursued at the expense of one another. The Civil Rights Division serves all Americans best when it enforces and protects all civil rights well.

Thank you for considering our views as you conduct your oversight responsibilities,

Gregory Baylor, Director
Christian Legal Society

Nathan Diament, Director
Union of Orthodox Jewish Congregations

Barrett Duke, Vice President
Ethics & Religious Liberty Comm'n,
Southern Baptist Convention

Richard Foltin, Legislative Counsel
American Jewish Committee

Kevin "Seamus" Hasson, President
Becket Fund for Religious Liberty

Rajbir Singh-Datta, Assoc. Director
Sikh American Legal Defense Fund

James Standish, Legislative Director
Seventh Day Adventist Church

Marc Stern, Counsel
American Jewish Congress